No. A-1048

Supreme Court, U. S.
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80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether a provision in respondent's pension plan which sanctions a forfeiture of vested retirement benefits by offsetting the amount of a subsequent worker's compensation award against the retiree's pension is unlawful under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1053.

2. Whether Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. 1144.

Parties to the Proceeding

Plaintiffs-Appellees-Petitioners in Case No. 79-1668:

Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated

Defendant-Appellant-Respondent in Case No. 79-1668:

The General Motors Corporation

Intervenor:

State of New Jersey

As *Amicus Curiae*:

Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller and George Zihol

Gray Panthers

Shenango, Inc., U.S. Steel Corp., Crucible Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard and Wheeling-Pittsburgh Steel Corp.

United States (Tax Division, Department of Justice)

Plaintiff-Appellees in Case No. 19-1534:

Joseph Allessi, Raymond Buisson, Stephen Michalski, Charles Repka, Helen Vogt and T. Edward White

Defendants-Appellants in Case No. 19-1534:

Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan

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No. A-1048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement of Jurisdiction

The Judgment of the Court of Appeals was entered on February 15, 1980. Said Judgment was certified and issued in lieu of a formal mandate on March 27, 1980.

A timely Petition for re-hearing was filed and was denied on March 19, 1980. On June 2, 1980, this Honorable Court entered an ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO AUGUST 16, 1980.

The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1).

Statutes and Regulations Involved

The following Statutes and Regulations, which are involved in this case are set forth in Appendix D, infra:

29 U.S.C. §1002(19)

29 U.S.C. §1053(a)

29 U.S.C. §1144(a)

N.J.S.A. 34:15-29

Statement of the Case

On August 5, 1977, plaintiff-petitioners, Henry Buczynski and Alex Borusovic, on behalf of themselves and "all other retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, similarly situated," instituted the instant action against The General Motors Hourly-Rate Employees Pension Plan (hereinafter referred to as the GM Pension Plan), which conditions the right to vested pension benefits by allowing the deduction of workers' compensation benefits received by a retiree from pension benefits otherwise payable to him. Plaintiff-respondents' complaint also sought the invalidation of this pension plan provision on the basis of N.J.S.A. 34:15-29, as amended by Chapter 156 of the Laws of 1977 of the State of New Jersey (hereinafter referred to as Chapter 156), which provides that:

> The right of compensation granted by this chapter [the New Jersey Worker's Compensation Act] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments. (A12a)

The above-mentioned action was removed to the United States District Court of the District of New Jersey on August 9, 1977 (A13a-15a), on the motion of respondent pursuant to 28 U.S.C. §1441. On August 9, 1978, an Order certifying class action was entered by consent of the parties pursuant to Federal Rule of Civil Procedure 23(b)2 (A50a-51a).

The plaintiffs are all retired employees of the General Motors Corporation who, at the time of their retirement, were employed by the General Motors Corporation in New Jersey. Each member of the plaintiff class was receiving a pension under the GM Pension Plan when he collected a workers' compensation award for a work-related injury. Plaintiff Buczynski received approximately $2,500.00, and plaintiff Borusovic received approximately $2,300.00. The full amount of these awards were subsequently deducted from their vested pension benefit under Article IV, Section 2 of the GM Pension Plan, which provides:

> Section 2. Deductions of Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed

> statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for the loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (A28a)

On August 24, 1978, the District Court issued a Memorandum Opinion in which it held that section 2 of Article IV of the GM Pension Plan constituted an illegal forfeiture of vested pension benefits under §203(a) of E.R.I.S.A., 29 U.S.C. §1053(a). The Court also determined that Chapter 156 of New Jersey Law was not pre-empted by E.R.I.S.A. See Appendix B, *infra.* Upon a motion by respondent for reconsideration, the District Court, on December 20, 1978 issued a second Opinion and an Order reaffirming its previous Decision. (A67a-75a).

Upon appeal by respondent, General Motors Corporation, and with the consolidation of the above-captioned case with the unreported decision in *Joseph Allessi, et al.* v. *Raybestos-Manhattan, Inc., et al.* (Docket No. 79-1534), which invalidated a similar pension plan provision, a three judge panel for the United States Court of Appeals for the Third Circuit reversed and remanded the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. The issue raised in question 1 is of paramount importance in that it involves the construction of §1053 of E.R.I.S.A. which has never been decided by this Court, and will affect the rights of retirees of over 7,000 pension plans across the United States.

The scope and purpose of E.R.I.S.A. is to provide a comprehensive nationwide Federal program for the protection of retirees vested pension benefits. Congressional policy, as embodied in the language of E.R.I.S.A., §2, 29 U.S.C. §1002, manifests the clear intention of Congress to make sure that if a worker has been promised a pension upon retirement and he has fulfilled the requirements for obtaining vested benefits, that he actually receive it. *Nachman Corporation* v. *Pension Benefit Guarantee Corp., et al.,* 48 U.S.L.W. 4524 (No. 78-1557, decided May 12, 1980).

The statutory provisions which unambiguously delineate the non-forfeitability policy expressed by Congress with respect to vested pension benefits are set forth in §203(a), 29 U.S.C. §1053(a), and §3(19) and 29 U.S.C. §1002(19). These sections provide that subject to the four carefully delineated exceptions of §203(a)(3), 29 U.S.C. §1053(a)(3), an employee's pension benefits, once vested, are not to be forfeitable for any reason.

Section 203(a)(2) of E.R.I.S.A., 29 U.S.C. §1053(a)(2) provides several alternative minimum vesting schedules, the only conditions being age and years of service. The two named petitioners, having satisfied all vesting requirements with regard to age and years of service, and being entirely vested, have a non-forfeitable right to 100% of their accrued benefits. Nowhere within the above-enu-

merated sections or elsewhere in the Act, is there a provision excepting offsets of workers' compensation awards from the general non-forfeitability requirements.

Despite the language, purpose and policy of E.R.I.S.A., if the law is, as stated by the Third Circuit, retirees and pensioners of General Motors Pension Plan as well as 7,000 other pension plans throughout the nation will be deprived of much of the protection which the Act purports to give them. Pension plans will be able to condition the receipt of vested pension benefits upon factors other than age and service. Article IV, §2 of the GM Pension Plan imposed a condition to the receipt of vested pension benefits, namely, forbearance from exercising statutory rights under state workers' compensation and occupational disease laws. By exercising such rights, plaintiff-petitioners can be deprived of some or all of their pension rights. In addition, many pensioners with more severe work-related disability awards can be expected to suffer major financial losses as a result of these pension forfeitures.

If the law is, as stated by the Third Circuit, pension plans will be able to reduce retirees' vested pension benefits through the imposition of offsets including, but not limited to, the subsequent receipt of a worker's compensation award. If the law is as the Third Circuit states, then the enjoyment of pension benefits which employees earn and on which they are entitled to rely, may be arbitrarily denied, even after the enactment of E.R.I.S.A.

In New Jersey, the only redress for a worker who is injured in the course of his employment, is filing a claim in the division of workers' compensation. Such a workers' compensation action is a statutory remedy, and is in lieu of the common law remedy of a tort action. If the Third Circuit decision is permitted to stand, provisions such as

Article IV, Section 2 of the GM Pension Plan will force an injured employee to elect whether to forego his statutory right to workers' compensation in order to collect his vested pension benefits, or to pursue his workers' compensation remedy only to have whatever award he receives set off against his retirement pension. The net result is to effectively deny such an employee of his only remedy for a job-related disability. Moreover, it would place maimed and injured retirees in the same economic position as their healthy counterparts without providing any additional benefits for the suffering and losses which would continue to burden them and diminish their enjoyment of life. There is no indication in the legislative history and language of E.R.I.S.A. that Congress intended this "harsh dilemma."

With the advent of the recent decision in *Nachman,* supra, this Honorable Court has made an important statement that E.R.I.S.A. was enacted to preclude the vestiges of previous pension practices which have the clear effect of depriving pensioners of their right to benefits. In *Nachman,* supra, the Court held that Congress did not intend to exclude otherwise vested benefits from E.R.I.S.A. coverage solely because an employer disclaims liability for deficiencies in a pension fund. Moreover, this Honorable Court reasoned that since the terms "vested" and "nonforfeitable" are to be used synonymously, any attempt by a pension plan to place a condition upon the receipt of vested pension benefits were impermissible forfeitures violative of the Act.

> As this Court stated in *Nachman,* §203(a) is a central provision in E.R.I.S.A. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of him having his age and length of service requirements no greater than those specified in §203(a)(2), as not subject to

> forfeiture. A provision in a plan which was purported to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3) would violate this section after January 1, 1976, its effective date . . . 48 U.S.L.W. 4526, n.10

It is respectfully submitted that the decision of the Third Circuit runs contrary to the above-cited observation by this Court in *Nachman,* supra. By interpreting the law in such a manner as to expand permissible forfeitures, the Third Circuit's opinion in this case is also in opposition to this Court's observation in *Nachman,* 48 U.S.L.W. at 4532, n.9 that:

> As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definition of "non-forfeitable" almost identical to that contained in 29 U.S.C. §1002(19) as finally enacted: "The definition of the term 'non-forfeitable' is intended to preclude any conditions to receipt of vested benefits other than those noted in the definition."

The opinion of the Third Circuit determined that Congress, under E.R.I.S.A., gave pension plans the right to make offsets against vested pension plan benefits in violation of the vesting and non-forfeitability requirements of E.R.I.S.A., 29 U.S.C. §1053(a). This Court should review this case in order to prevent the erosion of those protections which were clearly enumerated in the legislative history and statutory language of E.R.I.S.A.

The overwhelming weight of judicial authority under E.R.I.S.A., prior to the Third Circuit's decision herein, maintained that nearly identical offset provisions violated the minimum vesting standards of §203, 29 U.S.C. §1053 of E.R.I.S.A. In particular, in *Stong* v. *Bucyrus-Erie Co. and*

Bucyrus Hourly Retirement Plan, 472 F.Supp. 1088 (E.D. Wi. 1979), *recon. denied*, December 10, 1979, the Court held that the workers' compensation offset imposed conditions subsequent to an employee's right to his normal retirement benefits which were contrary to the above-mentioned provisions of E.R.I.S.A.

The pension plan provision invalidated in *Stong*, supra is the same provision currently being challenged, before the Third Circuit Court of Appeals, in seven consolidated class actions involving the steel industry. *Gargon* v. *Wheeling-Pittsburgh Steel Corp., et al.*, (Cir. No. 78-1367). Under the present situation, steelworkers in Milwaukee will not experience these pension offsets, while steelworkers in Pittsburgh, under the same basic steel contract, continue to have their vested pension benefits offset.

Moreover, in *Utility Union of America* v. *Consumers Power Co.*, 453 F.Supp 447 (E.D. Mich. 1978), the Court maintained that the plight of workers prompted the nonforfeitability language of E.R.I.S.A. This Court, citing statutory language and legislative history, concluded that Congress did not intend to exempt workers' compensation payments from the nonforfeitability requirement of E.R.I.S.A. It should be noted that the *Utility Workers* decision has been argued before the United States Court of Appeals for the Sixth Circuit in June of 1979, and a decision is expected soon.

The decision of the Third Circuit herein is also in conflict with other cases decided under the nonforfeitability standard of E.R.I.S.A. including *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), where the Second Circuit Court of Appeals held that:

> When section 203(a)(3)(B), provides that certain suspensions are not forfeitures, it necessarily implied that those not falling within its terms *are*.

The *Riley* Court concluded by maintaining that "each month's denial [of vested pension benefits] constitutes a separate forfeiture and a separate wrong" under E.R.I.S.A. 570 F.2d at 411.

The decision of the Third Circuit, in the case at bar, is also in conflict with the decision of the Eighth Circuit in *Winer* v. *Edison Brothers Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979) and with the decision of the Seventh Circuit in *Fremont* v. *McGraw-Edison,* 606 F.2d 752 (7th Cir. 1979) both of which held that any conditions upon receipt of nonforfeitable pension benefits were invalid.

By departing from these previous decisions, the Third Circuit has diluted the protection of retirees' vested pension benefits which E.R.I.S.A. was enacted to safeguard. There is nothing in the language, policy or history of E.R.I.S.A. to support the decision of the Third Circuit that workers' compensation offsets against vested pension benefits do not constitute impermissible forfeitures. This Court should review this case in order to protect the integrity of the Act and effectuate the intent of Congress, that being the protection of the rights of retirees and pensioners in this country.

2. Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. 1144.

Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (see Appendix D) became effective July 14, 1977 as an amendment to the New Jersey Workers' Compensation Act. As the trial court correctly concluded in its first opinion, said statute is not concerned with pension plans qua pension plans but only with ensuring that an employee receives his rightful compensation benefits. (A61a). This Honorable Court has found that workers compensation is an area in which the State is deemed to have broad authority under the police power, *DiCanas* v. *Bica,* 424 U.S. 351 (1976). Although the pre-emption of §514(a) of E.R.I.S.A., 29 U.S.C. 1144 admittedly is broad, it does not show a clear congressional intent to pre-empt a law, which is part of the New Jersey Workers Compensation Act and which is not concerned with "pension plans qua pension plans." Absent a clear congressional intent to pre-empt, pre-emption should not be found, *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977).

The State of New Jersey has manifested a strong interest in protecting workers in the employment relationship and in seeing that workers are compensated for work-related injuries, ever since the original enactment of the Workers' Compensation Statute in 1909. This State policy should be allowed to prevail provided it does not interfere with Federal regulation, *Merrill Lynch, Pierce, Fenner and Smith* v. *Ware,* 414 U.S. 117 (1973). The New Jersey law constitutes a ~~firm~~ exercise of police power proper since it does not interfere with the Federal regulatory

scheme in the area of benefit pensions and can operate in harmony with Federal law. It is respectfully submitted that the Third Circuit decision, finding the State law pre-empted by E.R.I.S.A., is in conflict with the previously cited decisions of this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1668

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,
Appellees

v.

THE GENERAL MOTORS CORPORATION,
Appellant

STATE OF NEW JERSEY,
Intervenor

(D.C. Civil No. 77-1644)

No. 79-1534

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,
Appellees

v.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,
Appellants

STATE OF NEW JERSEY,
Intervenor

Appendix A

(D.C. Civil No. 78-0434)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued: January 8, 1980

Before: GIBBONS, ROSENN and GARTH, *Circuit Judges*

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Appendix A

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Appendix A

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OPINION OF THE COURT

(Filed February 15, 1980)

GARTH, *Circuit Judge*

These two appeals pose a single question: whether the Employee Retirement Income Security Act of 1974 (ERISA) or the laws of New Jersey invalidate the provision of the pension plans of defendants General Motors and Raybestos-Manhattan authorizing reduction, or offset, of pension benefits by amounts received by the pensioner under a Workmen's Compensation statute. We conclude that these offset provisions are not unlawful under ERISA, and that the New Jersey statute prohibiting them is preempted by ERISA. We therefore reverse the district court orders which enjoined such offsets and which required payment to pension beneficiaries of those amounts which the pension trustees had offset in the past.

I.

Both these cases present similar fact patterns,[1] and procedural histories. General Motors (GM) and

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1. No material facts are in dispute in either case. In *Alessi*, all facts were stipulated. In *Buczynski*, the parties filed a stipulation of facts and the plaintiffs presented, at the instance of the district

Appendix A

Raybestos-Manhattan (Raybestos) maintain pension plans covered by ERISA, 29 U.S.C. §1001 *et seq.* (1976). Both pension plans provide that, under certain circumstances, benefits will be reduced by the amount of Workmen's Compensation payments received by plan participants.[2]

NOTE 1 — *(Continued)*
court, the testimony of Hubert Clodfelter. Clodfelter was a union negotiator for the United Auto Workers in 1970 when the GM pension plan was under consideration. He testified about the meaning of the "unless prohibited by law" clause in the GM offset provision. *See* note 2 *infra*.

2. The GM offset clause provides:

> Section 2. Deductions for Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

The Raybestos offset clause provides:

> All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may

Appendix A

In 1977, New Jersey enacted a statute expressly prohibiting such offset provisions. The statute, which became effective July 14, 1977, added the underscored sentence to N.J. Stat. Ann. §34:15-29 (Supp. 1979), a part of New Jersey's Workmen's Compensation program. The complete section now provides:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

Shortly after this statute went into effect, the plaintiffs brought class actions[3] against the defendants in the

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be enacted from time to time, which payments are paid concurrently with the Retirement Income.

3. In *Alessi*, the request for class certification was abandoned after the case was removed to the federal courts, and the action was continued on behalf of the named plaintiffs only. In *Buczynski*, the following class was certified by consent of the parties:

> The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." *See* order filed August 9, 1978.

Buczynski v. General Motors Corp., 456 F. Supp. 867, 868 n.1 (D.N.J. 1978).

New Jersey state courts. The named plaintiffs in each suit were former employees of the defendants who had recovered Workmen's Compensation judgments against the defendants and whose pension benefits were being reduced as a result.[4] The suits sought permanent injunctions against the offsets and recoupment damages for those offsets, alleged to be unlawful, which had already been made.

Both cases were removed by the defendants to the United States District Court for the District of New Jersey. Both district judges to whom the respective cases were assigned, reached the same result. The district court judge in *Buczynski* issued two published opinions. The first opinion is reported at 456 F. Supp. 867 (D.N.J. 1978). The second opinion, which denied reconsideration, is reported at 464 F. Supp. 133 (D.N.J. 1978). The district court judge in *Alessi* issued a single, unpublished letter opinion.

Although the complaints in both cases challenged the offsets only on the basis of the New Jersey statute, both courts found the offset invalid under §203(a) of ERISA, 29 U.S.C. §1053(a) (1976) (hereinafter §1053(a)). In so holding, both courts invalidated a regulation issued by the Treasury Department expressly authorizing the offset clauses, 26 C.F.R. §1.411(a)-4(a) (1979).[5] They also held that the New Jersey statute was

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4. One of the *Alessi* plaintiffs, Helen Vogt, had not yet begun to receive her plan benefits (which were deferred termination benefits rather than retirement payments) by the time suit was filed, and thus had not yet suffered the impact of the offset clause. She was scheduled to begin receiving termination benefits on February 1, 1979.

5. The *Buczynski* court's first opinion made no mention of the Treasury regulation. The regulation was only considered and found invalid in the opinion responding to GM's motion for reconsideration. *See* 464 F. Supp. at 134-36.

not superseded by ERISA's preemption clause, 29 U.S.C. §1144 (1976).[6]

General Motors and Raybestos bring these appeals, challenging the district courts' conclusions that the offsets are invalid under ERISA and that the New Jersey statute is not preempted. We address these issues in turn.[7]

II.

The plaintiffs claim that the defendants' offset is rendered unlawful by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). This section provides in pertinent part:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is

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6. The *Buczynski* court also held that it need not reach the preemption claim since it had already found that the offset was invalid under ERISA itself. *See* 456 F. Supp. at 872. Preemption was discussed, however, by assuming *arguendo* that the offset was *not* invalid under ERISA, *see id.* The court concluded that the New Jersey statute was not preempted, *id.* at 872-74.

After the *Buczynski* and *Alessi* opinions were issued, still another opinion of the district court of New Jersey addressing these questions was filed. Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). *Carpenter* diverged from *Buczynski* and *Alessi* by holding that ERISA did, indeed, preempt the New Jersey statute. *See* our discussion *infra* at Part III. The *Carpenter* court reached the same result as its predecessors, however, by holding that the Workmen's Compensation offset was prohibited by ERISA itself.

7. The State of New Jersey has intervened in both *Alessi* and *Buczynski*. In addition, several *amicus* briefs have been filed in *Buczynski*. The United States as *amicus* urges reversal of the district court. So do several steel companies, who are involved in litigation on this same issue in the Western District of Pennsylvania. These steel companies are: Crucible, Inc., Jones & Laughlin Steel Corp., Mesta Machine Co., Pullman-Standard, Shenango, Inc., United States Steel Corp., and Wheeling-Pittsburgh Steel Corp. The individual steelworkers, who are suing their employers on this issue, urge affirmance. The steelworkers are Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller, and George Zihol. The Gray Panthers, one of the *amici* permitted to file in *Buczynski*, urge affirmance as well.

nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

A Treasury regulation, however, addresses the permissibility of offsets under ERISA's antiforfeiture provision and expressly authorizes such offsets, declaring them *not* to be prohibited forfeitures. This regulation provides in pertinent part:[8]

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which

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8. This Treasury regulation was *not* issued under ERISA's antiforfeiture requirement found at 29 U.S.C. §1053(a) (1976), but rather under an antiforfeiture provision included in the Internal Revenue Code requirements for pension plans, 26 U.S.C. §411(a) (1976). The tax code requirement for pension plans was enacted in Title II of ERISA. ERISA expressly provides that Treasury Department regulations under the tax code pension provisions shall apply to the analogous provisions of ERISA codified in Title 29 of the United States Code. 29 U.S.C. §1202(c) (1976) provides:

> (c) Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter [which include 29 U.S.C. §1053(a)]. Except as otherwise expressly provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

We thus conclude that the Treasury regulation issued under the antiforfeiture requirement of 26 U.S.C. §411(a) (1976) must, if valid, control our interpretation of 29 U.S.C. §1053(a) (1976) as well. None of the parties here contends otherwise. This issue is discussed at greater length in Baker v. Otis Elevator Co., No. 79-1185, slip. op. at 5-8 (3d Cir., Nov. 13, 1979).

> are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

26 C.F.R. §1.411(a)-4(a) (1979).

In determining the legality of the Workmen's Compensation offset, then, we must begin our inquiry with this regulation, which, if held to be valid, would require us to sustain the offset provisions in the General Motors and Raybestos pension plans.

A.

In assessing the validity of 26 C.F.R. §1.411(a)-4(a) (1979), we first turn to a consideration of the character of the regulation. In this court's recent opinion in *Baker v. Otis Elevator Co.*, No. 79-1185 (3d Cir., Nov. 13, 1979), which also concerned the validity of a Treasury regulation interpreting a provision of ERISA, we recognized a distinction between two types of administrative regulations, with a corresponding distinction in the appropriate standard of review. We there stated:

> There can be no question but that the regulation with which we are here concerned is a legislative regulation which was issued pursuant to a clear delegation of rule making authority, *see* U.S.C. §1202(c) (1976). As Professor Davis has explained,
>
> > A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.
> >
> > The distinction between the two kinds of rules is fundamental. . . . Valid legislative rules have about the same effect as valid statutes; they are binding on courts. . . .
> >
> > [By contrast, however,] [c]ourts always have power to substitute their judgment for ad-

> ministrative judgment as to the content of interpretative rules, but they refrain in varying degrees from substituting judgment in various circumstances . . . .
>
> 2 K.C. Davis, Administrative Law Treatise, §7:8 at 36-37 (1979). We recognize the distinction in the nature of the two types of rules, leading in turn to a distinction in our standard of review. Our scope of review of legislative rules is far more restricted than the scope of our review of interpretative rules. *See id.*, at 37.

Slip. op. at 9-10.

After an analysis of the Supreme Court's decision in *Batterton v. Francis*, 432 U.S. 416 (1977), which addressed the same issue, we concluded in *Baker* that, to sustain a legislative regulation, "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole," slip op. at 11-12.

As in *Baker*, the Treasury Department regulation at issue here is plainly legislative in nature; it was issued pursuant to the same delegation of rule-making power as the regulation in *Baker*, which was there held to be legislative. *See* slip op. at 9; 29 U.S.C. 1202(c) (1976). It is thus subject to the limited review prescribed in *Baker*.[9]

The plaintiffs contend that the Treasury regulation must be struck down because it is inconsistent with the

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9. Neither district court here recognized that 26 C.F.R. §1.411(a)-4(a) (1979) is a *legislative* regulation. Other courts that have invalidated this regulation have failed as well to recognize this salient characteristic. *See* note 10 *infra*. By failing to accord this regulaton the appropriate degree of deference, these courts have impermissibly substituted their own judgment as to the interpretation of the statute for that of the Treasury Department.

governing statutory provision, ERISA's antiforfeiture requirement, 29 U.S.C. §1053(a) (1976). Before turning to their claim, we think it is appropriate to acknowledge that fidelity to the standard of review set forth in *Baker* and *Batterton, supra,* requires that a legislative regulation be invalidated only for a clear and manifest conflict with the governing statute. Overturning a legislative regulation where the statute may arguably be given conflicting readings, or where the conflict between the regulation and the statute is not plain, does violence to the congressional intent to delegate rule-making authority to the administrative agency. Approached from this perspective, the conclusions reached by the district courts in *Buczynski* and *Alessi,* that the regulation is inconsistent with 29 U.S.C. §1053(a) (1976), cannot be sustained: The legislative history affirmatively supports the Treasury regulation, and, at the very least, any conflict between the regulation and the statute, if one indeed exists, is clearly insufficient to mandate invalidation.

B.

The district courts here, as well as the other courts that have invalidated this regulation,[10] make similar syllogistic arguments to demonstrate the conflict with ERISA which they perceive. They begin with §1053(a), which provides broadly that pension benefits must be

10. In addition to *Buczynski* and *Alessi,* offset provisions have been declared unlawful, and the Treasury regulation has been invalidated, in Strong v. Bucyrus-Erie, 472 F. Supp. 1089 (E.D. Wis. 1979); Utility Workers' Union v. Consumers Power Co., 453 F. Supp. 447 (E.D. Mich. 1978), *appeal docketed,* No. 78-1402 (6th Cir., August 2, 1978); and Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). Offset provisions, and the Treasury regulation authorizing them, have been *upheld* in Bordine v. Evans Products Co., 453 F. Supp. 19 (E.D. Mich. 1978); Pavlovic v. Chrysler Corp., No. 7-70438 (E.D. Mich., Jan. 10, 1978), and Carlson v. Bundy Corp., No. 6-72272 (E.D. Mich. 1977).

nonforfeitable. They then focus on §1053(a)(3), which specifically exempts certain pension plan provisions from the nonforfeitability rule. The list of these exceptions includes, *inter alia,* nonpayment of benefits if the plan participant dies, §1053(a)(3)(A), and suspension of benefits if the participant takes a job with an employer in the same industry, §1053(a)(3)(B). This list, however, does not include offsets for Workmen's Compensation. Finally, these district courts add to §1053(a) the definition of "nonforfeitable" found in 29 U.S.C. §1002(19) (1976), which provides:

> (19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions *shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.* (emphasis added).

Armed with these provisions, these district courts reason as follows: all reductions in benefits are forfeitures; all forfeitures are prohibited by §1053(a), with the sole exceptions being those listed in §1053(a)(3); Workmen's Compensation offsets are not included in the list of permissible forfeitures in §1053(a)(3); *ergo,* Workmen's Compensation offsets are prohibited forfeitures. Thus, they conclude that the Treasury regulation authorizing offsets for benefits provided under Federal or State law is in conflict with ERISA, and is therefore invalid, because it expands the class of permissible forfeitures beyond those specifically set forth in

§1053(a)(3). The *Buczynski* district court, in its second opinion, makes the argument as follows:

> Another difficulty with the defendant's interpretation results from ERISA's handling of the term "nonforfeitable". 29 U.S.C. §1002(19) provides the definition. Under this section, only the exceptions specifically included in §1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in §1053(a)(3) are exceptions to §1002's definition of nonforfeitability.
>
> Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. Treas.Reg. §1.411(a)-4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.

464 F. Supp. at 135-36 (footnotes and citations omitted).

Thereafter, the district court in *Alessi*, relying on the *Buczynski* opinions, reached the same result. *See Alessi v. Raybestos-Manhattan*, No. 78-0434, slip op. at 5 (D.N.J., Feb. 15, 1979).

While this argument is not without some superficial appeal, the courts' syllogism is defective, and we must reject it. Understanding this defect, however, requires some explanation of the regulation of pension plans by the Internal Revenue Service before and after ERISA was enacted.

Prior to enactment of ERISA in 1974, the Internal Revenue Code set forth a variety of requirements that had to be met by pension plans in order to qualify for fa-

vorable tax treatment. One requirement was that the plans be nondiscriminatory. This tax code requirement was set forth in 26 U.S.C. §401(a)(4) & (5). On the passage of ERISA, these sections were amended, but the amendments did not alter the basic aim of the statute. Discrimination in contributions or benefits under a pension plan was still prohibited. These sections now provide in pertinent part:

> (a) Requirements for qualification. — A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * *
>
> (4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are—
>
> (A) officers,
>
> (B) shareholders, or
>
> (C) highly compensated.
>
> * * *
>
> (5) . . . [A] plan [shall not] be considered discriminatory . . . merely because the contributions or benefits of or on behalf of the employees under the plan . . . differ because of any retirement benefits created under State or Federal law. . . .

Under these sections, the IRS prior to ERISA had extensive experience with a pension plan provision similar to the offset clause challenged here. That provision was the offset of Social Security benefits against pension benefits. In its interpretation of the clause excerpted above from 26 U.S.C. §401(a)(5), the IRS had long permitted pension plans to offset pension benefits by the amount of Social Security benefits that a plan partici-

pant received. The first such regulation was issued in 1943, and it simply reiterated the statutory language quoted above. The current version of this regulation, issued in 1960, provides as follows:

> (b) A plan . . . under which the contributions or benefits differ because of any retirement benefit created under State or Federal law, will not be discriminatory because of such exclusion or difference, provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 401(a).

26 C.F.R. §1.401-4(b) (1979).

The parties do not dispute that this regulation permits offset of pension benefits by the amount of Social Security benefits received.

In enacting ERISA, Congress was familiar with the practice of the IRS allowing such offset provisions. Congress was also aware that the IRS, while allowing such offsets, would not permit any *increase* in the rate of offset based upon any *increase* in the level of Social Security benefits occurring after a retiree began to receive his pension. Congress sought to codify this administrative practice of not permitting an increased offset based upon *increased* Social Security benefits, and did so by enacting §1021(e) of ERISA, which is codified at 26 U.S.C. §401(a)(15) (1976). This section provides:

> (15) a trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part . . . such benefits are not *decreased* by reason of *any increase* in the benefit levels payable under title II of the Social Security Act or *any increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first re-

ceipt of such benefits or the date of such separation, as the case may be. (emphasis added).

Congress's understanding in enacting this section is made clear in the report of the House Ways and Means Committee:

> Protection is given to retired individuals and individuals who are separated from the service of the employer against reductions in private plan benefits when social security benefit levels increase. In general, under present integration [*i.e.*, offset] procedures, social security benefits attributable to employer contributions are treated as though they were part of the private plan. As a result when the level of social security benefits increases, some integrated plans have reduced the amount of the retirement benefits that they provide for covered employees.
>
> Present law under administrative practice provides that qualified plans may not use increases in social security benefit levels to reduce the benefits that they pay where the employees concerned are retired and are already receiving integrated plan benefits. The bill codifies this treatment for retired persons. It also extends the prohibition against reducing plan benefits where social security benefit levels are increased to cases where the individuals concerned are separated from service prior to retirement and have deferred nonforfeitable rights to plan benefits. This provision is effective for increases in social security benefits which take place after the date of enactment or on the date of the first receipt of plan benefits or the date of separation from service (whichever is applic) if that date is later.
>
> These changes do not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized.

H.R. Rep. No. 93-807, 3 U.S. Code Cong. & Admin. News 4670, 4695-96 (1974).

Despite certain misgivings about offset, or integration practices expressed later in this report, Congress chose *not* to bar the Social Security offset entirely, but merely to prohibit *increases* in the amount of the offset based on *increases* in the amount of Social Security benefits.

A number of conclusions can be drawn from this history, conclusions which shed light on the analysis on which the *Alessi* and *Buczynski* courts relied in striking down the Treasury regulation. In choosing only to limit *increased* Social Security offsets rather than bar them entirely in §401(a)(15), Congress gave its implicit approval to the practice of permitting offsets against pension plan benefits — in that instance, an offset of Social Security benefits against pension plan benefits. Further, since §401(a)(15) was enacted at the same time as §1053(a)'s requirement that pension benefits be nonforfeitable, we must conclude that the offset of Social Security benefits implicitly approved in the former section was *not* simultaneously rendered illegal by the latter section's requirement of nonforfeitability.

This conclusion reveals the primary defect in the *Buczynski/Alessi* district court analyses. Those courts reasoned, as noted above, that all benefit reductions are forfeitures, and all forfeitures are impermissible except for the four exceptions listed in §1053(a)(3). Yet Congress has approved the Social Security offset, and that offset does not appear among the permissible forfeitures under §1053(a)(3). Thus, the district courts' reasoning runs afoul of Congress's approval of the Social Security offset. If all reductions in benefits are forfeitures, and all forfeitures are prohibited with the exceptions listed in §1053(a)(3), then, under the district courts' reasoning, Social Security offsets should also be prohibited. Yet, as we have seen, this is not the case. It is true, as the courts

reasoned, that all *forfeitures* are prohibited with the exception of those listed in §1053(a)(3), but it *cannot* be true that all reductions in benefits are necessarily forfeitures. Congress's implicit approval of the Social Security offset compels the conclusion that such an offset is *not* a forfeiture. Thus, the very basis on which the district courts found the Treasury regulation in issue here to conflict with §1053(a) is in error.

The plaintiffs contend, however, that the Workmen's Compensation offset cannot be sustained on the strength of Congress's approval of the Social Security offset. They contend that even if the Social Security offset is not a forfeiture under ERISA, the Workmen's Compensation offset *is*. Social Security benefits and pension benefits, they point out, are both designed to compensate for wages lost as a result of old age, and therefore the Social Security offset simply avoids a duplication of benefits directed to the same end. Workmen's Compensation, by contrast, is designed to compensate for losses flowing from employment related injuries; thus, the Workmen's Compensation offset, unlike the Social Security offset, cannot be defended as a means to avoid duplication of benefits.

The plaintiffs' argument here fails to recognize the breadth of the Social Security program. Social Security provides benefits for *disabilities*, *see* 42 U.S.C. §423 (1976), as well as benefits for old age. Thus, the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits. The Social Security offset, since it includes an offset of disability benefits, makes any purported distinction between the Social Security offset and the Workmen's Compensation offset meaningless. The disability offset, included within the Social Security offset, thus compels us to reject any purported distinction between Social Security offsets and Workmen's Compensation offsets.

And the same argument may be made with respect to benefits provided under the Railroad Retirement Act, 45 U.S.C. §231 *et seq.* (1976). The same implicit congressional approval of offsets of Social Security benefits that appears in 26 U.S.C. §401(a)(15) (1976) is accorded to offsets of Railroad Retirement Act benefits in 29 U.S.C. §1056(b) (1976).[11] Railroad retirement benefits include payments for disability as well as payments for old age. *See* 45 U.S.C. §231a(a)(1)(iv) & (v) (1976). Thus, Congress has implicitly approved two disability offsets against retirement payments. As a result, reliance on the difference in the character of the offsets (retirement benefits as opposed to disability benefits) is misplaced.

The conclusion that not all benefit reductions are forfeitures; that, specifically, a Social Security offset is not a forfeiture; and that the district courts' reasoning is erroneous, is enough by itself to require upholding the Treasury regulation under the review of legislative regulations prescribed by *Baker v. Otis Elevator* and *Batterton v. Francis*. Once we conclude that Social Security offsets are not forfeitures, in the absence of clear evidence that Congress intended to prohibit Workmen's Compensation offsets, it cannot be said that a regulation allowing Workmen's Compensation offsets is so contrary to ERISA that it cannot stand. Thus, we conclude that there is an insufficient basis on which to strike down the regulation.

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11. 29 U.S.C. §1056(b) provides in pertinent part:

> [A] plan may not *decrease* benefits of such a participant by reason of any increase in the benefit levels payable under title II of the *Social Security Act or the Railroad Retirement Act of 1937*, or any *increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation. (emphasis added).

Appendix A

C.

Our conclusion that a proper interpretation of ERISA requires giving binding effect to this regulation receives further support in the legislative history of the Act. That history demonstrates to our satisfaction that Congress did not disapprove of Workmen's Compensation offsets as well as Social Security offsets.

In the course of IRS administration of the nondiscrimination requirement for pension plans under 26 U.S.C. §401(a)(4) & (5) (1976), the Service issued a revenue ruling explicitly approving an offset for Workmen's Compensation:

> Section 401(a)(5) of the Code provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.
>
> The effect of section 401(a)(5) of the Code is to permit total benefits inclusive of those provided under the social security or similar program, to be used for comparative purposes. *See* Part 4(j) of Revenue Ruling, 65-178, C.B. 1965-2, 94. A program, like the social security program, that requires employer contributions and makes benefits available to the general public is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.
>
> Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.

Appendix A

> Since the benefits payable under a *workmen's compensation law or occupational diseases law* are available to the general public, it is held that *benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan* in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer. (emphasis added).

Rev. Rul. 68-243, 1968-1 C.B. 157, 158.

The substance of this ruling has been republished by the IRS on two occasions.[12]

The legislative history of ERISA indicates that Congress was familiar with the IRS rules on integration of benefits in pension plans, and intended that these rules

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12. In 1969, the IRS published an extensive Revenue Ruling consolidating and updating the rules on qualification of pension plans under 26 U.S.C. §401 (1976). This ruling contained the same position expressed in Revenue Ruling 68-243:

> (4) *Integration With Benefits Provided Under Other Public Programs.* — Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. *Thus, benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan.* However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. *See* Rev. Rul. 68-243, C.B. 1968-1, 157. (emphasis added).

Rev. Rul. 69-421, part 4, (j)(4), 1969-2 C.B. 61, 72.

This same provision was included without change in a special IRS publication in 1972. Internal Revenue Service, Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972).

be preserved. The report of the Conference Committee states:

> Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

H. Conf. Rep. No. 93-1280, 3 U.S. Code Cong. & Admin. News 5038, 5058 (1974).

This history of IRS practice with respect to Workmen's Compensation offsets, and of congressional preservation of the antidiscrimination rules, suggests that, if anything, Congress approved of Workmen's Compensation offsets. Thus, the evidence indicates that the Treasury regulation in issue here conforms to congressional intent. Accordingly, because the regulation is not contrary to §1053(a) and the provisions of ERISA as a whole, we must sustain its validity.[13]

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13. An additional argument in support of the position taken by GM and Raybestos was made by the *amicus* steel companies. They called our attention to a proposal made in Congress by Senators Harrison Williams and Jacob Javits, two of the original sponsors of ERISA. The proposal, if enacted into law, which it was not, would have prohibited Workmen's Compensation offsets. The proposal states:

> (a) Section 206(b) of such Act [ERISA] is amended
>
> * * * *
>
> (3) by adding at the end thereof the following new sentence: "A pension plan may not reduce or suspend retirement pension benefits being received by a participant or beneficiary or retirement pension benefits in which a participant who is separated from the service has a nonforfeitable right by reason of any payment made to the participant or beneficiary by the

III.

Our conclusion that the Treasury regulation must be sustained does not, by itself, require granting judgment in favor of the defendants. For even if ERISA does not prohibit the Workmen's Compensation offset in the GM and Raybestos pension plans, New Jersey's 1977 statute *does*. This statute, as noted earlier, provides in relevant part:

> The right of compensation granted by this chapter [the workmen's compensation act] may be set off

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employer maintaining the plan as the result of an award or settlement made under or pursuant to a workers' compensation laws."

As we understand the argument, the steel companies contend that there would have been no need for the introduction of such a proposal unless ERISA as originally enacted, and as currently in force, permitted Workmen's Compensation offsets.

While certainly plausible, we do not attribute much weight to this argument. The difficulty with it, as with all arguments of this nature, is that the understanding of the amendment's sponsors is open to conflicting interpretations. It is possible that the sponsors believed that such offsets were permissible under the original ERISA. It is also possible, however, that they believed that such offsets were *impermissible* under ERISA as enacted, and sought the amendment to override the Treasury regulation that erroneously, in their view, authorized such offsets. Thus, the argument cuts both ways.

Two additional arguments, attacking our conclusion that the regulation is valid, are made by *amici* Gray Panthers and Steelworkers. Neither of these arguments merits discussion. They argue that the regulation conflicts with 29 U.S.C. §1056(d)(1) (1976), which provides that pension plan benefits "may not be assigned or alienated," and with 29 U.S.C. §1103(c)(1) (1976), which provides that "the assets of a plan shall never inure to the benefit of any employer, and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." In our opinion, the discussion and analysis found in part II, *supra*, which demonstrates an overriding congressional intent to permit Workmen's Compensation offsets against pension benefits, disposes of these contentions as well.

against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

N.J. Stat. Ann. §34:15-29 (Supp. 1979).

The statute, of course, prohibits the offset clause challenged here, and the defendants do not contend otherwise. They do claim, however, that this statute is superseded by ERISA's preemption provision, 29 U.S.C. §1144(a) (1976).[14] This section states:

(a) Except as provided in subsection (b) of this section,[15] the provisions of this subchapter and subchapter III of this chapter shall supersede any

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14. The State of New Jersey, which has intervened in both *Buczynski* and *Alessi*, asks us to abstain from deciding the preemption question. It suggests that if we await a New Jersey state court interpretation of the statute, it may obviate our consideration of the preemption claim. The state suggests that the New Jersey courts are likely to hold that N.J. Stat. Ann. §34:15-29 (Supp. 1979) protects employees who obtained Workmen's Compensation judgments after the statute went into effect. Since all the plaintiffs in *Alessi* and all the named plaintiffs in *Buczynski* recovered their judgments before the effective date of the statute, it does not, New Jersey argues, protect them and there is no need to determine whether the statute is preempted by ERISA.

However, we decline to abstain for two reasons. First, the construction of the statute that New Jersey proposes will not forever remove the need for consideration of the preemption question. It will simply postpone consideration until a claim is made by an employee who recovered a Workmen's Compensation award after July 14, 1977 and it appears to us that such a claim is not far off. Second, and of greater importance, the certified class in *Buczynski* appears to include persons who recovered Workmen's Compensation judgments after the statute's effective date. *See* note 3 *supra*. Thus, there are plaintiffs in this suit who are protected by the statute regardless of how the New Jersey courts may construe the statute. In this posture, then, we are obliged to resolve the preemption claim.

15 None of the exceptions referred to are applicable here, and the plaintiffs do not argue to the contrary.

and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The district court judge in *Buczynski*, despite his conclusion that the offset provision was unlawful under ERISA itself, nevertheless discussed the preemption issue. The district court in *Buczynski*, followed thereafter by *Alessi*, concluded that the New Jersey statute was not preempted:

> It is true that under ERISA, 29 U.S.C. §1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. §1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. . . .
>
> Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. §1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here.

456 F. Supp. at 872-73 (citations omitted).

Our reading of ERISA satisfies us that ERISA *does* preempt N.J. Stat. Ann. §34:15-29 (Supp. 1979). Thus, we cannot agree with the district courts that have concluded otherwise.[16] The primary purpose of the statute, and its direct effect, is to prohibit pension plans from offsetting Workmen's Compensation benefits against pension retirement benefits. It simply cannot be said that this statute does not concern pension plans *qua* pension plans (*Buczynski*), or that its effect on such plans is merely collateral (*Alessi*). In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans; this purpose negates the characterization of the statute attributed to it by the New Jersey district courts.

Further, ERISA preempts state statutes that "*relate to* any employee benefit plan," 29 U.S.C. §1144(a) (1976) (emphasis added). The view taken by the *Buczynski* court, that ERISA preempts only statutes concerning "pension plans *qua* pension plans," could be accepted only if ERISA's preemption clause were much more narrowly drawn than it is. Here, the preemption clause, reaching statutes that "relate to" pension plans, has an obviously broader scope

In noting that "the New Jersey statute undoubtedly 'relates to' pension plans in the broadest dictionary sense of that term," 456 F. Supp. at 872, the district court in *Buczynski* appears to concede the difficulty of its narrow interpretation. The court reasoned, however, that Congress could not have intended the term to be given its full breadth. Yet the legislative history of the clause, as well as the plain meaning of its language, belie this claim. The legislative history of the clause has been de-

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16. As previously noted, *see* note 6 *supra*, still another New Jersey district court has addressed this preemption question, and agrees with our conclusion that the New Jersey statute is preempted by ERISA. *See* Carpenter Technology Corp. v. Boyton, No. 78-1415, slip op. at 5-9 (D.N.J., Dec. 12, 1979).

tailed elsewhere and we need not repeat it here. *See Wadsworth v. Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915-17 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). We need only note its most prominent features: that the original House and Senate provisions were significantly narrower, and were rejected by the Conference Committee in favor of the current provision; and that explanations of the Conference substitute given on the floor of both chambers make plain that the preemptive intent is just as broad as its language suggests. Thus, it is clear that the preemption provision is intended to be read in its normal dictionary sense, and that the New Jersey statute prohibiting Workmen's Compensation offsets cannot stand.[17]

IV.

We conclude that the Workmen's Compensation offset in General Motors's and Raybestos's pension plans is not a forfeiture rendered invalid by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). In so concluding, we sustain the Treasury regulation expressly authorizing provisions of this type, 26 C.F.R. §1.411(a)-4(a) (1979). We also conclude that the New Jersey statute that prohibits these offsets, N.J. Stat. Ann. §34:15-29 (Supp. 1979), is preempted by ERISA, 29 U.S.C. §1144(a) (1976).

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17. Raybestos, in the district court in Alessi, contended that the New Jersey statute should be struck down on at least two other grounds. First, that the statute was preempted under the National Labor Relations Act, and, second, that it was an unconstitutional impairment of the obligation of contracts. The court rejected both of these attacks, slip op. at 8-9. In light of our conclusion that the statute is preempted by ERISA itself, we need not reach these issues.

Appendix A

In light of our conclusions, which are contrary to the conclusions reached by the district courts in both *Buczynski* and *Alessi*, we will vacate the respective orders dated April 3, 1979 (*Buczynski*) and March 1, 1979 (*Alessi*) which permanently enjoin the defendants from offsetting Workmen's Compensation benefits and which required that reimbursement be made for amounts offset in the past; we direct that the district courts enter judgment for the defendants. Each side shall bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1534

ALESSI, JOSEPH, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKS, HELEN VOGT AND T. EDWARD WHITE

vs.

RAYBESTOS-MANHATTAN, INC. AND RAYBESTOS-MANHATTAN, INC., EMPLOYEE RETIREMENT PLAN JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Appellants,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 78-0434)

No. 79-1668

BUCZYNSKI, HENRY, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED

vs.

Appendix B

THE GENERAL MOTORS CORPORATION,

Appellant,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 77-1644)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, ROSEN and GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on January 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated April 3, 1979 and appealed at our No. 79-1668, and dated March 1, 1979, and appealed at our No. 79-1534, be, and the same are hereby vacated and the causes are remanded to the said District Courts for entry of judgments for the defendants, all in accordance with the opinion of this Court. Each side shall bear its own costs.

Appendix B

Attest:

THOMAS F. QUINN
Clerk

Certified as a true copy and issued in lieu of a formal mandate on March 27, 1980.

February 15, 1980

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1668

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs-Appellees,

THE GENERAL MOTORS CORPORATION,

Defendant-Appellant,

STATE OF NEW JERSEY,

Intervenor.

SUR PETITION FOR REHEARING

Present: ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM AND SLOVITER,

Circuit Judges

The petition for rehearing filed by Plaintiffs-Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Dated: March 19, 1980

By the Court,

Leonard I. Garth
Judge
Leonard I. Garth, U.S.C.J.

APPENDIX D

Petition for Removal

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY:

The Petition of General Motors Corporation, for removal of this action from the Superior Court of New Jersey, Chancery Division, Union County, to the United States District Court for the District of New Jersey, respectfully shows to this Honorable Court:

1. That your Petitioner, General Motors Corporation, is the defendant in a civil action brought against it in the Chancery Division of the Superior Court of the State of New Jersey, Union County, entitled, "Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated,

Plaintiffs, vs. The General Motors Corporation, Defendant," a copy of the Complaint (and annexed Affidavits) and Order to Show Cause in which action are annexed hereto and made parts hereof as Exhibits A and B, respectively, the same constituting all the process, pleadings, and orders served upon your Petitioner in said action.

2. That the aforesaid action was commenced by the filing of said Complaint and Order to Show Cause on August 5, 1977, said Complaint and Order to Show Cause having been received by your Petitioner on August 9, 1977.

3. That your Petitioner was, at the time of the commencement of the aforesaid action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and an employer and the administrator of an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, and was and is engaged in commerce within the meaning of Section 301 (a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a).

4. That the aforesaid action is a suit alleging a violation of the rights of the plaintiffs under a contract between an employee and a labor organization representing employees in an industry affecting commerce and an action by a participant or beneficiary of an employee pension benefit plan to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan, within the meaning of Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(a), and a civil action of which the United

States District Courts have original jurisdiction under and pursuant to the provisions of Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a), Section 502(e) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1), and 28 U.S.C. §1331, and a civil action which may be removed to this Court pursuant to the provisions of 28 U.S.C. §1441.

5. That your Petitioner files and presents herewith a bond, with good and sufficient surety, in the penal sum of Five Hundred Dollars ($500.00), conditioned, as required by 28 U.S.C. §1446(d), that Petitioner will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this cause is not removable or is improperly removed.

WHEREFORE, your Petitioner prays that this cause proceed in this Court as an action properly removed thereto.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant-Petitioner
General Motors Corporation
By: LAURENCE REICH
A Member of the Firm
744 Broad Street
Newark, New Jersey 07102
(201) 622-7711

Dated: August 9, 1977

Appendix D

Order Certifying Class Action, Etc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(Hon. Frederick B. Lacey)

Civil Action No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

This matter having been opened to the Court by Lester Weiner, Esq., attorney for plaintiffs, on the application of plaintiffs for an order certifying the above-entitled action as a class action, and the Court noting the consent of the parties hereto to the entry of this Order, and good cause appearing,

IT IS, on this 9th day of August, 1978,

ORDERED, that this action be and it hereby is certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure; and it is

Appendix D

FURTHER ORDERED, that the class be and it hereby is certified as consisting of those persons who are retired members of the General Motors Corporation Hourly-Rate Employes Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, datad November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey; and it is

FURTHER ORDERED, that the above-entitled action be and it hereby is set down for Pretrial Conference before Honorable William J. Hunt at 9:00 A.M. on April 10, 1978, and for trial before this Court on May 1, 1978.

FREDERICK B. LACEY, U.S.D.J.

We hereby consent to the making and entry of the foregoing Order.

LESTER WEINER
Attorney for Plaintiffs
By: MARC C. GETTIS

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

JOHN J. DEGNAN
Attorney General of the State of New Jersey
Attorney for Intervenor
By: MICHAEL S. BOKAR
Deputy Attorney General

Appendix D

Memorandum Opinion of the United States District Court for the District of New Jersey (August 24, 1978)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

Plaintiffs in this class action[1] are retired employees of defendant General Motors Corporation who had been re-

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[1] The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." See order filed August 9, 1978.

ceiving retirement pension benefits from the defendant pursuant to a pension plan negotiated between the defendant and plaintiffs' union. After the plaintiffs received worker's compensation payments pursuant to New Jersey's Worker's Compensation Act,[2] the defendants reduced the plaintiffs' benefits under the plan by an amount equal to those payments, pursuant to Article IV, Section 2, of the plan.

The plaintiffs contend that the defendant cannot lawfully make such deductions in their pension benefits. They seek reimbursement of all pension benefits thus withheld and a permanent injunction against all such future deductions which are predicated upon the receipt of worker's compensation payments.

For the reasons set forth below, the plaintiffs are entitled to the relief they seek.

Dealing first with the issue of subject matter jurisdiction in this removed matter, 28 U.S.C. § 1441, I conclude I have such jurisdiction to decide the issues. Even were there any question about the propriety of removal by the defendant, neither side has questioned it. Since it is clear I would have had original jurisdiction over the claims presented here, a valid judgment can be entered with respect to them.[3] *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 702 (1972).

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[2] N.J.S.A. 34:15 *et seq.*

[3] Thus, this court would have had original subject matter jurisdiction over the instant action under the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) and under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(f), 1132(a)(3).

Moreover, this court has removal jurisdiction over plaintiffs' state court action under 28 U.S.C. § 1441(a)(b), predicated upon 29 U.S.C. § 185(a).

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The complaint as filed alleges that the plaintiffs are retired employees of the defendant, that they have been receiving pension benefits under a Pension Plan Agreement between their union and the defendant, that they have obtained judgments entitling them to worker's compensation benefits, and that the defendant threatens to reduce their pension benefits because they have recovered worker's compensation benefits. The complaint sets forth Article IV, Section 2 of the Pension Plan Agreement:

> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (emphasis added)

The complaint then alleges that the deductions threatened by the defendant are now in violation of a recent amendment to New Jersey's Worker's Compensation Act[4] which provides that:[5] "The right of compensation granted by this chapter may bet set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments." The complaint concludes with a prayer for a permanent injunction against the threatened deductions.

Plaintiffs' action, therefore, is predicated upon an alleged breach or violation of the "unless prohibited by law" clause of the Pension Plan Agreement.[6] Thus they argue that, since Article IV, Section 2 of the Pension Plan Agreement bars the defendant from offsetting pension benefits against worker's compensation benefits where "prohibited by law," and the New Jersey Worker's Compensation Act embodies such a prohibition, the continued deductions violate the express provisions of the Pension Plan Agreement.

The complaint did not advance a claim founded upon a theory that the offset provision is unlawful under ERISA. That claim was first raised indirectly when plaintiffs' counsel brought to this court's attention the recently decided

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[4] There is no allegation that defendant threatens to make the deductions in plaintiffs' pension benefits contrary to the three exceptions to the offset provision contained in subdivisions (a), (b), or (c) of Article IV, Section 2 of the Pension Plan Agreement.

[5] L. 1977, c. 156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29.

[6] Subsequent to the filing of the complaint, the defendant has been making the deductions in plaintiffs' pension benefits and has made it clear that it will continue to do so.

Appendix D

Utility Workers Union of America v. *Consumers Power Co.*, No. 7-71747 (E.D.Mich., filed June 13, 1978). The defendant's response was not a claim of prejudice by reason of a belated addition to plaintiffs' bag of legal theories of recovery.[7] Instead, the defendant responded by referring the court to another case[8] in the same court, the Eastern District of Michigan, which was decided contrary to the *Utility Workers* case.

The defendant, as I have noted, admits all of the material allegations necessary to a decision on the question of whether ERISA itself bars the offset involved, including that the pension plan falls within the coverage of ERISA. *See* 29 U.S.C. § 1003.

Thus, I perceive no prejudice to the defendant in addressing the issue of the lawfulness of the offsetting in question under 29 U.S.C. § 1053 of ERISA. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil, § 1219.[9]

---

[7] The defendant contended only that the ERISA claim was "entirely outside the scope of the pleadings and proof now before the court" and that the *Utility Workers* case was therefore irrelevant. Letter to Court, dated July 26, 1978.

[8] *Bordine* v. *Evans Product Co.*, No. 7-71652 (E.D. Mich., filed April 6, 1978).

[9] Once a federal court has removal jurisdiction, a party may amend his complaint to assert a federal claim that could not have been presented in the state court. *Freeman* v. *Bee Machine Co.*, 319 U.S. 448 (1943). This court has removal jurisdiction over plaintiffs' breach of contract claim which was asserted in state court. *See* n.3 *supra*. Thus, under *Freeman*, the plaintiffs could have amended their complaint here to assert the unlawfulness of the offset provision under ERISA, 29 U.S.C. § 1053, a claim over which this court has original subject matter jurisdiction under 29 U.S.C. § 1132(f).

Appendix D

The Offset Provision of the Pension Plan Is Unlawful Under ERISA

The minimum vesting standards provision of ERISA, 29 U.S.C. § 1053, provides in pertinent part that:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefits is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.[10]

• • •

[10] Subparagraph (B) provides for an alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service. For example, an employee who has served at least 5 years would have a nonforfeitable right to 25% of his accrued benefit, while an employee who had served at least 15 years would have a nonforfeitable right to 100% of his accrued benefit.

(Footnote continued on following page)

Appendix D

In *Utility Workers,* it was held that a provision in a pension plan falling within the coverage of ERISA which provides that retirement pension benefits are to be offset against worker's compensation benefits is unlawful under ERISA, 29 U.S.C. § 1053. This court is in full agreement with the well-reasoned opinion in that case.[11]

Under ERISA, a pension plan must provide that an employee's rights in his accrued benefits derived from his own contributions is nonforfeitable.[12] The pension plan must also provide that an employee has a nonforfeitable right to a certain percentage of his accrued benefit derived

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(Footnote continued from preceding page)

Subparagraph (C) provides for yet a third alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service and his age. For example, where an employee has served at least 5 years and the sum of his age and service is at least 45, he has a nonforfeitable right to 50% of his accrued benefit; but where an employee has at least 10 years of service and the sum of his age and service is at least 55, he has a nonforfeitable right to 100% of his accrued benefit.

It is immaterial whether plaintiffs' pension plan is one predicated upon subparagraph (A), (B), or (C) of 29 U.S.C. § 1053 (a)(2).

[11] This court rejects the contrary holding in the case of *Bordine, supra* note 9, at 4.

[12] ERISA does not provide for any exceptions to the nonforfeitability requirement in the case of accrued benefits derived from employee contributions.

from employer contributions,[13] the particular percentage depending upon (1) his years of service or (2) his years of service and his age.

When a pension plan, such as the one under consideration here, makes the employee's right to a certain percentage of his accrued benefit derived from employer contributions conditional upon a factor other than years of service or years of service and age, the plan is unlawful, unless the factor is one of those set forth in 29 U.S.C. § 1053(a)(3).

The pension plan herein makes the plaintiffs' rights to their accrued benefits conditional upon their not obtaining worker's compensation benefits. Such a factor is not one of those set forth in 29 U.S.C. § 1053(a)(3).[14] As a result, the pension plan is unlawful.[15]

---

[13] The court will assume that plaintiffs' pension plan is fully funded by the defendant.

[14] 29 U.S.C. § 1053(a)(3) legalizes pension plans which provide that an employee's right to an accrued benefit is forfeitable if he dies, if he is employed in certain types of industries, if certain amendments are made retroactive, or if he withdraws any amount attributable to the benefit derived from mandatory contributions made by him.

[15] In addition to *Utility Workers, see also Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 (2d Cir. 1977).

Appendix D

The Offset Provision of the Pension Plan Is Void Under the "Unless Prohibited By Law" Clause of the Pension Plan

As noted previously, the Pension Plan Agreement between the defendant and the plaintiffs' union provides that retirement pension benefits may be offset against worker's compensation benefits "unless prohibited by law." At the final hearing in this case on May 15, 1978, the testimony established that after a number of years' absence from the General Motors' pension plan, the offset provision reappeared in the 1970 pension plan.[16] The testimony also established that it was the defendant which proposed the reinsertion of the offset provision into the pension plan because there had been a "deluge" of worker's compensation cases from which the defendant sought "relief."[17] The "unless prohibited by law" clause was also proposed by the defendant. The "unless prohibited by law" clause "meant just as the language indicated, pure and simple, that if there were states then having state laws which prohibited an offset and if in the future there would be state laws that prohibited offset that would be applicable and it was just that pure and simple.[18]

---

[16] The offset provision was continued in the 1973 and 1976 pension plans. All three plans contain the "unless prohibited by law" clause. Stipulation of December 7, 1977.

[17] Testimony of Hubert Clodfelder, Union Negotiator, Hearing of May 15, 1978, Tr. at 8. The pension plan being negotiated was to apply to 130 General Motors' plants located in at least thirty states.

[18] *Id.* at 10.

Appendix D

The defendant admits that the deductions it is making in plaintiffs' retirement pension benefits are prohibited by the recent amendment to New Jersey's Worker's Compensation Act. The defendant contends, however, that that amendment is unconstitutional under the Supremacy Clause of the United States Constitution, in that it has been preempted by ERISA, 29 U.S.C. § 1144(a),[19] which provides that:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

As I have already indicated in the preceding section of this opinion, the offset provision of the pension plan is unlawful under ERISA, 29 U.S.C. § 1053. The New Jersey statute, insofar as it is merely duplicative of ERISA, is preempted by that federal statute. *Rogers* v. *Larson,* 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

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[19] The defendant also contends that the New Jersey statute is preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.* This contention, however, is without merit, since the parties specifically agreed that the offset provision of the pension plan would be inapplicable if it was prohibited by state law. By applying the recent amendment to New Jersey's Worker's Compensation Act to bar the offset of pension benefits against worker's compensation benefits, this court would be doing nothing more than enforcing the agreement between the parties reached after the give and take of collective bargaining.

However, assuming *arguendo* that ERISA does not outlaw the offset provision of the pension plan, it becomes necessary to determine whether the specific preemptive langu .ge of ERISA, 29 U.S.C. § 1144(a), renders the New Jersey statute null and void as applied to the facts of this case. If the New Jersey statute is not preempted by ERISA, the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the recent amendment to New Jersey's Worker's Compensation Act became effective on July 14, 1977.

In determining whether the New Jersey statute is preempted,[20] this court is guided by the opinion of the Court of Appeals for the Third Circuit in the case of *Rogers* v. *Larson, supra* at 620-21, wherein the court discussed the three preemption "tests":

> The Supreme Court has . . . established three grounds upon which a local statute may be deemed pre-empted by federal law. It will be pre-empted (1) if "Congress has unmistakenly so ordained," or (2) if "the nature of the regulated subject matter permits no other conclusion" but pre-emption, or (3) if it violates the Supremacy Clause by standing "as an obstacle to the accomplishment and execution of

[20] The court reiterates that this discussion is predicated upon the assumption that the offset provision of the pension plan is *not* unlawful under ERISA.

> the full purposes and objectives of Congress." (citation omitted)[21]

The touchstone of all three preemption tests is Congressional intent to preempt. *Rogers* v. *Larson, supra* at 621 n.8.

The defendant contends that the New Jersey statute is preempted under the first preemption test, in that Congress, through the specific preemptive language of ERISA, 29 U.S.C. § 1144(a), "unmistakenly" intended to preempt this state law.[22]

It is true that under ERISA, 29 U.S.C. § 1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New

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[21] With respect to the last two tests, the court explained that:

> We understand the second test to mean that the subject matter of the federal and local laws is such that the two laws or regulatory schemes must inherently either conflict or be duplicative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation.
>
> The third test is applied when there is room in the subject area for both federal and local regulation. This test requires the court to examine both statutory schemes to determine if they can co-exist or if they conflict.

Rogers v. *Larson*, 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

[22] The defendant does not argue that the New Jersey statute is preempted under either preemption test (2) or (3). It is clear to this court that the statute is not preempted under either of those tests.

Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. § 1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. *See Allied Structural Steel Co.* v. *Spannaus,* 46 U.S.L.W. 4887, 4889 n.8 (U.S. June 28, 1978); *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 n.1 (U.S. April 3, 1978); *Marshall* v. *Chase Manhattan Bank,* 558 F.2d 680, 683 (2d Cir. 1977). However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. This is clear from the language of the statute itself. The statute provides that worker's compensation benefits may be set off against *disability* pension benefits, but not against *retirement* pension benefits. Thus, under the statute an employee is not entitled to double compensation for a work-related disability, once under the Worker's Compensation Act, and once under his pension plan. On the other hand, an employee *is* entitled to be compensated at least *once* for his work-related disability. It is self-evident that if an employee can receive compensation for his work-related disability under New Jersey's Worker's Compensation Act just to have an equal amount taken away from his retirement pension benefits, the employee, in reality, has been deprived of compensation for his work-related disability.[23] *Utility Workers Union*

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[23] It is obvious that an employer could not justify, upon any rational basis, giving one employee less retirement pension benefits than another employee solely on the basis that the former employee has a work-related disability while the latter does not.

of America v. *Consumers Power Co., supra,* slip op. at 16 n.12. The New Jersey statute forbids such a result.

Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. § 1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here. That Congress recognizes state law preeminence in the field of worker's compensation law is clear from ERISA itself which exempts from the coverage of ERISA an employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws. . . ." 29 U.S.C. § 1003(b)(4).[24]

That New Jersey had a strong interest in enacting the recent amendment to its Worker's Compensation Act cannot be denied. That Act "was intended to place the cost of accidental injuries which are work-connected upon employers, who may provide for them as operating expenses. *Renshaw* v. *United States Pipe & Foundry Co.,* 30 N.J. 458 (1959); *Tocci* v. *Tessler and Weiss, Inc.,* 28 N.J. 582 (1959)." *Daniello* v. *Machise Express Co.,* 119 N.J. Super 20, 24 (LawDiv. 1972), *aff'd,* 122 N.J. Super 144 (App. Div. 1973). Where a disability is compensable under that statute, a common law suit by the employee against his employer is unavailable. *Dudley* v. *Victory Lynn Lines, Inc.,* 32 N.J. 479 (1960). Consequently, if an employer can avoid his statutory duty to provide compensation to his

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[24] This court assumes that plaintiffs' pension plan is not such a plan. Nevertheless, 29 U.S.C. § 1003(b)(3) is relevant to determining Congressional intent with respect to the term "relate to" in 29 U.S.C. § 1144(a).

employees for work-related disabilities, the employee is without any remedy at all. If an employer can reduce an employee's retirement pension benefits by an amount equal to the employee's award of worker's compensation disability benefits, the employer has accomplished just that—he has avoided his statutory obligation to compensate the employee for his work-related disability. Thus, New Jersey had a strong interest in closing that "loophole" in its Worker's Compensation Act by enacting the recent amendment under consideration here.

In *Farmer* v. *Carpenters,* 430 U.S. 290, 302 (1977), the Supreme Court stated that:

> Our cases indicate, however, that inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

While it is true that the Court in that case was speaking of the National Labor Relations Act, as amended, which, unlike ERISA, does not contain specific preemptive language, the statement is nevertheless relevant in discerning Congressional intent with respect to the term "relate to" in ERISA, 29 U.S.C. § 1144(a).

The State of New Jersey's substantial interest in enacting the recent amendment to its Worker's Compensation Act has already been demonstrated. Moreover, this court cannot discern how that amendment threatens any interference with the federal regulatory scheme of ERISA, let alone undue interference. Finally, since the amendment simply does not relate to pension plans *qua* pension plans, but is instead directed towards protecting an em-

ployee's right to worker's compensation benefits, this court concludes that Congress did not intend to preempt the amendment by enacting ERISA and the preemptive language of 29 U.S.C. § 1144(a).[25]

CONCLUSION

I hold as follows:

1. Plaintiffs are entitled to the relief they seek because the offset provision of their pension plan is unlawful under ERISA, 29 U.S.C. § 1053.

2. Assuming *arguendo* that Congress did not outlaw the offset provision by enacting ERISA, Congress did not intend ERISA to prohibit the states from outlawing such offset provisions. Consequently, the plaintiffs are entitled to the relief they seek because the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the State of New Jersey amended its Worker's Compensation Act on July 14, 1977 so as to prohibit offsets of retirement pension benefits against worker's compensaiton benefits.

FREDERICK B. LACEY
United States District Judge

Dated: August 24, 1978

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[25] Plaintiffs' contention that 29 U.S.C. § 1144(a) is inapplicable to the case at bar by reason of 29 U.S.C. § 1144(b)(1) is without merit. That provision provides as follows:

> (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

Consequently, this court has found it necessary to consider the meaning of 29 U.S.C. § 1144(a) as applied to the facts of this case.

Appendix D

Opinion of the United States District Court for the District of New Jersey (December 20, 1978)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, et al.,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

The defendant moves for reconsideration of this court's decision embodied in an opinion and order filed August 24, 1978. That decision invalidated reductions by the defendant in the pension payments made to the plaintiffs in an amount equal to the value of payments received under the New Jersey Worker's Compensation Act, N.J.S.A. 34:15 *et seq.* Struck down was the pension plan's provision allowing this offset, Article IV, Section 2, on two separate grounds: first, that the offsets were unlawful under 29 U.S.C. § 1053; second, even if Congress did not forbid these pension deductions, New Jersey was not barred by the preemption doctrine from passing a law which effectively

outlawed this offset under the "unless prohibited by law" clause of the plan.

The defendant, in its motion to reconsider, challenges both rationales upon which the earlier decision was grounded.

29 U.S.C. § 1053

The defendant's action, I previously had held, violated the minimum vesting section of ERISA, 29 U.S.C. § 1053, by failing to make nonforfeitable the plaintiffs' rights to their retirement benefits. The defendant, arguing that the offsets do not constitute a forfeiture within the meaning of ERISA, relies on Treas. Reg. § 1.411(a)-4(a), which provides:

> Furthermore, nonforfeitable rights are not to be considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

Two courts have applied this regulation to hold that deducting worker's compensation payments from pension payments does not offend ERISA's nonforfeitability requirement. *Bordine* v. *Evans Products Co.*, 453 F.Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January 10, 1978).[1]

Plaintiffs have placed in issue the validity of the aforesaid regulation. Although Treasury Regulations are ac-

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[1] *Contra, Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447, 455 n.11 (E.D. Mich. 1978).

corded great respect and are not lightly overruled, *see Bingler* v. *Johnson,* 394 U.S. 741, 479-51 (1969), a Treasury Regulation that is inconsistent with Congressional enactments cannot stand. *United States* v. *Cartwright,* 411 U.S. 546, 557 (1973). A regulation will be struck down if it is inconsistent with the plain wording of a federal statute, *Busse* v. *Commissioner,* 479 F.2d 1147, 1152-53 (7th Cir. 1973), or if the regulation "conflict[s] with the philosophy and avowed purpose of legislation." *New York Shipbuilding Corp.* v. *United States,* 237 F.Supp. 995, 999 (D.N.J. 1965), *aff'd,* 362 F.2d 551 (3d Cir. 1966) (per curiam). Thus, the existence of a regulation does not end the inquiry.

First, the plaintiffs claim the Secretary of the Treasury is powerless to prescribe regulations affecting pension rights under 29 U.S.C. § 1053. This contention is without merit.

Thus, 29 U.S.C. § 1202(c) provides:

> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 . . . shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

Treas. Reg. § 1.411(a)-4(a) was issued to give guidance in interpreting 26 U.S.C. § 411; and 29 U.S.C. § 1053, entitled "minimum vesting standards," is located in part 2 of subtitle B of subchapter I. Accordingly, the Secretary of the Treasury had the authority to promulgate a binding regulation regarding § 1053.

Next to be considered is whether the aforesaid regulation is consistent with ERISA. The defendant's argument that it is requires careful analysis. First, the defendant points to 26 U.S.C. § 401, which states the requirements

for qualifying a pension plan. One requirement is that the plan be nondiscriminatory. A plan is not considered discriminatory "merely because the contributions or benefits . . . differ because of any retirement benefits created under State or Federal law." § 401(a)(5). In interpreting this statute, the Internal Revenue Service has ruled that a plan could provide that worker's compensation benefits could be offset against pension benefits without the plan being discriminatory. Rev.Rul. 68-243. Next, the defendant notes that Congress, in enacting ERISA, did not modify of 26 U.S.C. § 401(a)(5). Also, Congress explicitly stated that it "intend[ed] that the anti-discrimination rules of present law in areas other than the vesting schedule are not to be changed." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5058. Thus, defendant argues, because the pre-ERISA rules permitted deductions for worker's compensation benefits and this policy regarding nondiscrimination was continued by Congress, it therefore follows that Treas. Reg. § 1.411(a)-4(a) is consistent with ERISA generally and with § 1053 in particular.

This convoluted skein of reasoning is unconvincing. First, it is questionable that Congressional intent concerning 26 U.S.C. § 401 indicates anything at all about Congressional intent as to nonforfeitability under § 1053. *See Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 n.3 (2d Cir. 1977). The legislative history of ERISA underscores this. Under the heading of "permitted forfeitures of vested rights," Congress declared that "an employee's rights, once vested, are [with certain exceptions] not to be forfeitable for any reason. An employee's rights to benefits attributable to his own contributions may never be forfeited." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S.

Code Cong. & Ad. News 5038, 5052. The report then lists a series of exceptions to the principle that an employee's vested rights are not forfeitable. None of these exceptions mention worker's compensation.

Another difficulty with the defendant's interpretation results from ERISA's handling of the term nonforfeitable. 29 U.S.C. § 1002(19) provides the definition.[2] Under this section only the exceptions specifically included in § 1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in § 1053 (a)(3) are exceptions to § 1002's definition of nonforfeitability. *See Riley* v. *MEBA Pension Trust, supra,* 570 F.2d at 409; *Utility Workers Union* v. *Consumer Powers Co., supra,* 453 F.Supp. at 456; *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005, 1008 (N.D. Ohio 1976).

Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. *See United States* v. *Bacto-Undisk,* 394 U.S. 784 (1969); *New York Shipbuilding Corp. supra.* Treas. Reg. §1.411(a)-

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[2] The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in § 1053(a)(3) of this title.

4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.[3]

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[3] The defendant makes two other arguments to sustain its position. Noting that the same phrase appears in both 26 U.S.C. § 401(a)(5) and in 29 U.S.C. § 1082(c)(4)(A), the defendant takes this as evidence of the continued vitality of Rev.Rul. 68-243, which upheld offsets for Worker's Compensation as not being discriminatory for the purposes of 26 U.S.C. § 401(a)(4), suggesting that § 1053 also allows offsets. As was said in *Utility Workers Union, supra*: "The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language." 453 F.Supp. at 456.

The defendant also refers the court to 29 C.F.R. § 2605, stressing the language in the definitions in subsection 2:

> "Pension Benefit" means a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves . . . which payments by themselves or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient.

Under this regulation, the defendant argues, the Pension Benefit Guarantee Corporation (PBGC) has authorized reducing pension benefits if worker's compensation is provided. This regulation suffers from the same defects as does the Treasury Regulation, (Treas, Reg. § 1.411(a)-4(a), except that it is without a statutory basis and derives no support from the legislative history.

Appendix D

N.J.S.A. 34:15-29

The defendant also argues that the court erred in finding that the New Jersey law forbidding the offsets[4] (L. 1977, c.156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29) was not preempted by ERISA. The Third Circuit Court of Appeals recently enumerated the three grounds for preempting a state statute. In its motion for reconsideration, the defendant strongly contends that the New Jersey statute is invalid due to the second ground: "'the nature of the regulated subject matter permits no other conclusion' but pre-emption." *Rogers* v. *Larson,* 563 F.2d 617, 621 (3d Cir. 1977), *appeal filed,* 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978) (citations omitted). Elaborating further, the court stated that this basis for preemption existed when "the subject matter of the federal and local laws . . . must inherently either conflict or be dupli-

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[4] The defendant again argues that preemption should be found under 29 U.S.C. § 1144(a) because the New Jersey law "relates to" pension plans. The defendant cites several cases in which preemption has been found. While those cases are useful in illuminating the Congressional intent underlying ERISA, the cases are not dispositive. "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question." City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (citations omitted). The same is also true with respect to the state regulation in question, for whether preemption by ERISA can be found will depend on the exact nature of the state laws. *Compare* National Carriers' Conference Comm. v. Heffernan, 454 F.Supp. 914 (D. Conn. 1978) *and* Standard Oil Co. of Cal. v. Agsauld, 442 F.Supp. 695, 707 (N.D. Cal. 1977) *with* Stone v. Stone, 450 F.Supp. 919, 931-33 (N.D. Cal. 1978) *and* Gast v. State, 47 U.S.L.W. 1067 (Oct. 31, 1978 Oregon). The court's conclusion that the New Jersey Worker's Compensation Law does not "relate to" pensions will be adhered to. *See also* Johnston v. Johnston, 47 U.S.L.W. 2331 (Oct. 27, 1978 California).

cative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation." *Id.*

For the purpose of analyzing preemption, this court, in its earlier opinion, assumed *arguendo* that ERISA did not forbid the offsets and that the New Jersey law was not on its face inconsistent with the federal enactment. If Congress had plainly declared that deductions for worker's compensation payments were allowed, or if the New Jersey law frustrated the Congressional purpose, then the Supremacy Clause would compel the striking down of New Jersey's law. *Ray* v. *Atlantic Richfield Co.*, 46 U.S.L.W. 4200, 4201 (1978). Thus, in treating the preemption question, it will continue to be assumed that Congress has not addressed the permissibility of offsets, either to allow them or to prohibit them.[5] Under this assumption, it is clear the New Jersey statute is not preempted, based upon the wording of the second ground of *Rogers* v. *Larson, supra.* It neither duplicates nor conflicts with ERISA.

This conclusion, aside from being compelled by *Rogers* v. *Larson, supra,* also follows from general principles of preemption. In a field historically falling within the sphere of state regulation, preemption will not be found unless a clear Congressional intent to preempt is found. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). As determined in my earlier opinion, that clear expression

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[5] Consonant with the earlier opinion, the court still views the legislative history as being one consistent with the forbidding of offsets. To the extent that this history reveals Congressional intent to be unclear, in no way can the legislative history be said to support the contrary conclusion, that offsets were to be permitted.

of intent is absent. New Jersey's statute lies within the allowable range of police activity that gives rise to the presumption against preemption.

> States possess broad authority under their police power to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and *workmen's compensation laws* are only a few examples.

De Canas v. *Bica*, 424 U.S. 351, 356 (1976) (emphasis added)

After noting that the California statute challenged as being preempted belonged in the category of traditional state police powers, the Court found no preemption under the preemption test that "the nature of the . . . subject matter permits no other conclusion." *Id.*, quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). *Rogers* v. *Larson, supra*, derives from this portion of *De Canas* its second ground for preemption; this shows that New Jersey's strong interest in worker's compensation will be a significant factor militating against finding preemption.

Another important rule in deciding preemption cases is that state and federal regulatory schemes should be harmonized, if possible. "[W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties." *Merrill Lynch Pierce Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973). The Court then went on to hold that California could apply its statute voiding restraints on competition,

despite the fact that the rule which the petitioner sought to enforce had been promulgated pursuant to federal statute. The Court observed that "California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme." *Id.* at 139-40.

Accordingly, given that the New Jersey statute neither duplicates nor conflicts with ERISA, that Worker's Compensation forms an area of strong public interest to New Jersey, see Memorandum Opinion at 9-10, and that the court is under a duty due to the nature of the federal system to try to validate proper exercises of the state police power, preemption does not exist. The offsets by the defendant are therefore barred by the "unless prohibited by law" clause.

Conclusion

Upon reconsideration, the previous decision of this court is followed.

Frederick B. Lacey
United States District Judge

Dated: December 20, 1978

Appendix D

Amended Order Filed April 5, 1979

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

(Hon. Frederick B. Lacey)

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

The matter having come for trial before Honorable Frederick B. Lacey, U.S.D.J., upon the verified complaint and action for injunction of plaintiffs, Henry Buczynski and Alex Borusovic, and the class represented by them (Lester Weiner and Associates, Esqs., appearing for the plaintiffs, and Carpenter, Bennett & Morrissey, Esqs., appearing for defendant), and the court having certified the action as a class action, and the court having considered the testimony, stipulations of fact, briefs, memoranda, and arguments of counsel, and the court having filed a memorandum opinion on August 24, 1978 and the court having given reconsideration to its decision upon defendant's motion for

reconsideration, and the court having filed its opinion on December 20, 1978;

IT IS HEREBY ORDERED that the defendant, General Motors Corporation, is hereby permanently enjoined from making any deductions from retirement pensions payable to the plaintiffs and class members, other than benefits payable by reason of disability, pursuant to Article IV, section 2 of the General Motors Corporation Hourly-Rate Employes Pension Plan; and

IT IS FURTHER ORDERED that defendant shall pay over to each plaintiff and class member the amount of money deducted from his or her basic pension benefits, which benefits have been made payable as a result of having reached normal retirement age (together with interest from the date of deduction), within 30 days from the date of the Order; provided that in the event this court's judgment that the deduction violates 29 U.S.C. § 1053 is reversed, that defendant shall pay over within 30 days from the date of the entry of this Order all sums deducted from any retirement plan benefits, other than benefits payable by reason of disability (together with interest from the date of deduction), on or after July 14, 1977; and

IT IS FURTHER ORDERED that the provisions of this order are stayed during the pendency of the appeal.

Frederick B. Lacey
United States District Judge

Dated: April 3, 1979

APPENDIX E

Relevant Statutory Provisions

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

29 U.S.C. §1053(a)

§ 1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

Appendix E

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated

from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the

participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from em-

ployer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount with-

drawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross Reference.—

For nonforfeitably[1] where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

29 U.S.C. §1144(a)

SUPERSEDURE; EFFECTIVE DATE

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Appendix E

N.J.S.A. 34:15-29. Compensation preferential lien; claim not assignable; set offs

The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. The right of compensation granted by this chapter may be set off against disability pension benefits or payments but not shall be set off against employees' retirement pension benefits or payments. Amended by L.1977, c.156, §1, eff. July 14, 1977.

No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 8, 1980

CERTIORARI GRANTED NOVEMBER 3, 1980

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JOINT APPENDIX

Docket Entries

Date	*Proceedings*
8/10/77	Petition for removal from Superior Court of Union County with copies of Complaint and order to show cause re preliminary injunction filed 8-9-77.
8/10/77	Removal Bond, filed 8-9-77.
8/10/77	Notice of Allocation and Assignment filed. (Newark-Lacey)
8/15/77	Hearing on plaintiffs' application for a *temporary restraining order.* Ordered hearing continued to September 12, 1977. (Lacey) (8-11-77)
8/15/77	Plaintiffs' notice of motion for a temporary restraining order returnable August 11, 1977, filed 8-11-77. (No brief)
9/ 1/77	Stipulation and order extending time of defendant to answer complaint to 9-13-77, filed 8-31-77. (Lacey) Notice mailed.
9/ 8/77	Affidavit of Virginia Triano, filed 9-7-77.
9/ 8/77	Affidavit of Walter Meissner, filed 9-7-77.
9/14/77	Hearing on plaintiffs' application for a *temporary restraining order.* DECISION RESERVED. (Lacey) (9-12-77)
9/14/77	Hearing on application of State of N.J. for leave to intervene as defendant. Ordered hearing continued to a date to be fixed. (Lacey) (9-12-77)

Docket Entries

Date	*Proceedings*
9/14/77	*Answer,* filed 9-13-77.
10/ 6/77	EVIDENTIARY HEARING on plaintiff's application for a preliminary injunction. DECISION RESERVED. (Lacey) (10-5-77)
10/11/77	Transcript of hearing held August 11, 1977, filed.
10/18/77	Plaintiffs' notice of motion to certify this action as a class action returnable November 14, 1977, proof of service filed. (Brief submitted)
11/16/77	At call for hearing on motion of plaintiffs to certify this action as a class action, Court indicated motion consented to. (Lacey) (11-14-77)
12/ 9/77	Stipulation, setting forth applicability of pensions plan re retired employees, filed 12-7-77.
1 /9/78	Transcript of hearing held 10-5-77 filed 1-6-78.
2/27/78	Memorandum opinion, filed 2-21-78. (Lacey) (denying plaintiffs motion for preliminary injunction)
2/27/78	Order denying plaintiffs motion for preliminary injunction, filed 2-21-78. (Lacey) Notice mailed.
3/ 9/78	Hearing on plaintiff's motion for class action certification. Ordered motion granted. Order to be submitted. (Lacey) (3-6-78)
3/ 9/78	Ordered pre-trial conference set for April 10, 1978 before Judge Hunt. (Lacey) (3-6-78)
3/ 9/78	Ordered trial date set for May 1, 1978. Order to be submitted. (Lacey) (3-6-78)

Docket Entries

Date	*Proceedings*
4/19/78	Status Conference. (Lacey) (4-14-78) Ordered trial date set for 5-15-78.
4/21/78	*Pre-trial* order, filed 4-19-78. (Hunt) (Directing that State of N.J. may intervene as a party defendant and acknowledging Judge Lacey's order to certify this action as class action.)
4/28/78	*Pre-Trial Conference.* (Hunt) (4-13-78)
5/11/78	Stipulation re Exhibits A, B, and C are designated as Joint Exhibits of Pensions Plans; joint Exhibits D and E are true copies of Section 2 of Article IV of the 1958 and 1961 Pension Plans, filed 5-10-78.
5/17/78	EVIDENTIARY HEARING on plaintiffs' application for a permanent injunction. DECISION RESERVED. (Lacey) (5-15-78)
5/25/78	Transcript of hearing held March 6, 1978, filed 5-24-78.
5/25/78	Transcript of hearing held May 15, 1978, filed 5-24-78.
5/30/78	Acknowledgment of service of copy of complaint by the U.S. Department oi Labor, Washington, D.C., filed 5-26-78.
8/10/78	Order certifying Class Action, etc., filed 8-9-78. (Lacey) Notice mailed.
8/25/78	Memorandum Opinion, filed 8-24-78. (Lacey) (Granting plaintiff's application for a permanent injunction, etc.)

Docket Entries

Date	*Proceedings*
9/18/78	Hearing on defendant's application to settle the form of the order. Ordered hearing continued to October 29, 1978. (Lacey) (9-15-78)
9/27/78	Transcript of hearing held September 15, 1978, filed 9-26-78.
10 /2/78	Defendant's notice of motion for reconsideration of Memorandum Opinion of August 24, 1978 returnable October 30, 1978, proof of service filed 9-29-78. (Brief submitted)
11/ 2/78	Transcript of hearing held September 12, 1977, filed.
12/13/78	Hearing on defendant's motion for reconsideration of Memorandum Opinion of August 24, 1978. Ordered motion denied. (Lacey) (12-7-78).
12/21/78	OPINION filed 12-20-78. (Lacey) (the previous decision is followed)
12/21/78	Order directing the previous decision of the court embodied in opinion of August 24, 1978 is adhered to, filed 12-20-78. (Lacey) Notice mailed.
1/10/79	Plaintiffs' notice of motion for plaintiff's counsel fees and costs of action be charged against defendant returnable Feb. 13, 1979 proof of service, filed 1-9-79. (Memorandum submitted)
1/12/79	Substitution of attorney on behalf of plaintiff, filed 1-11-79.
1/26/79	Defendant's notice of motion to stay judgment pending appeal returnable Feb. 13, 1979, proof of service, filed 1-24-79. (Brief submitted)

Docket Entries

Date	*Proceedings*
1/29/79	Affidavit of Lester Weiner in support of plaintiffs' motion for counsel fees and costs, etc., filed.
1/29/79	Affidavit of Lester Weiner of services and disbursements, filed.
1/29/79	Affidavit of Marc C. Gettis for services rendered, filed.
1/29/79	Affidavit of Joel B. Hopmayer for services rendered, filed.
1/31/79	Transcript of hearing held December 7, 1978, filed 1-30-79.
2/ 8/79	Affidavit of Richard Meyer filed. 2-6-79
2/ 8/79	Affidavit of Ray J. Wright filed. 2-6-79
2/ 8/79	Certificate of Service of affidavits filed. 2-6-79
2/20/79	Hearing on motion of plaintiffs' for counsel fees and costs of action DECISION RESERVED. (Lacey) (2-13-79)
2/20/79	Hearing on motion of defendant to stay judgment pending appeal. DECISION RESERVED (Lacey) (2-13-79)
2/20/79	Continued hearing on defendant's application to settle the form of the order. DECISION RESERVED. (Lacey) (2-13-79)
3/21/79	Transcript of hearing held February 13, 1979 filed, 3-20-79.
3/30/79	Letter Opinion filed 3-29-79. (Lacey) (Denying Plaintiffs' motion for attorneys' fees and granting defendant's motion for stay

Docket Entries

Date	*Proceedings*
3/30/79	Order for permanent injunction in favor of Plaintiffs, Henry Buczynski, Alex Borusovic and other retirees similarly situated and against Defendant, The General Motors Corporation with costs, and staying order during pendency of appeal, filed 3-29-79. (Lacey) Notice mailed.
4/10/79	Order withdrawing order for permanent injunction filed 3-29-79 filed 4-5-79. (Lacey) Notice Mailed.
4/10/79	Order for permanent injunction in favor of plaintiffs, Henry Buczynski, Alex Borusovic and other retirees similarly situated and against defendant, The General Motors Corporation with costs, and staying order during pendency of appeal, filed 4-5-79. (Lacey) Notice Mailed.
4/20/79	Notice of appeal of defendant filed 4-12-79 at 3:40 P.M.
4/20/79	Copies of notice of appeal sent to U.S.C.A. and Weiner, Staubach, Edelson & Hopmayer, Esqs.
5/10/79	Notice of motion of plaintiffs to tax costs ret. 5-10-79 and Bill of costs and disbursements, filed 5-9-79.
8/ 1/79	Briefs of defendant-appellant and *amicus* filed with the Court of Appeals
9/14/79	Briefs of plaintiffs-appellees and *amicus* filed with the Court of Appeals
10/31/79	Reply Briefs of defendant-appellant and *amicus* filed with the Court of Appeals

Docket Entries

Date	*Proceedings*
1 /8/80	Argument of the case in the Court of Appeals
2/15/80	Judgment of the Court of Appeals for the Third Circuit entered; Opinion of the Court announced
3/ 3/80	Petition of plaintiffs-appellees for rehearing *en banc* filed with the Court of Appeals
3/19/80	Petition for rehearing denied
3/27/80	Judgment of the Court of Appeals certified in lieu of mandate
5/30/80	Application by plaintiffs-petitioners for an extension of time in which to file a Petition for a Writ of Certiorari filed
6/ 2/80	Application granted by Order of Justice Brennan
8/ 8/80	Petition for a Writ of Certiorari filed
8/18/80	Application by defendant-respondent for an extension of time in which to file a Brief in Opposition filed
8/20/80	Application granted
10/ 2/80	Brief in Opposition filed
11/ 3/80	Writ of Certiorari granted

Complaint

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: UNION COUNTY
CIVIL ACTION No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC and
OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

vs.

THE GENERAL MOTORS CORPORATION,

Defendant.

Plaintiffs, Henry Buczynski who resides at 144 Willow Avenue, in the Borough of Garwood, County of Union, State of New Jersey, and Alex Borusovic who resides at 96 Longfellow Street, in the Borough of Carteret, County of Middlesex, State of New Jersey for themselves and for all other retired members of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, similarly situated say:

1. Plaintiffs were hourly employees of the General Motors Corporation with places of business located at 1300 Raritan Road, Clark, New Jersey; 1016 West Edgar Road, Linden, New Jersey and Parkway Avenue, Trenton, New Jersey.

2. Plaintiffs were hired by the defendant, General Motors Corporation as hourly rated production employees.

3. Plaintiffs became members of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America.

4. The International Union, United Automobile Aerospace and Agricultural Implement Workers of America is recognized by the defendant, General Motors Corporation, as the sole bargaining agent for all hourly rated production and maintenance employees of the New Departure Hyatt Bearings Plant at Clark, New Jersey, the Linden Assembly Plant in Linden, New Jersey, and the Fischer Body Plant in Trenton, New Jersey.

5. Plaintiff, Alex Borusovic worked continuously for the defendant, General Motors Corporation for a period of 22 years until March 31, 1973, at which time he retired.

Plaintiff, Henry Buczynski worked continuously for the defendant, General Motors Corporation for a period of 34 years until January 1, 1972.

All other unnamed plaintiffs on whose behalf this action is brought worked for the defendant, General Motors Corporation for a number of years and retired prior to the date of July 14, 1977.

6. The International Union, United Automobile Aerospace and Agricultural Implement Workers of America have had successive written Agreements covering the pension plan for hourly rated production and maintenance employees of the International Union, United Automobile Aerospace and Agricultural Implement Workers of

America and all hourly rated production and maintenance employees who are members of the International Union, United Automobile Aerospace and Agricultural Implement Workers of America and are employees of the General Motors Corporation. The most recent Pension Agreement between the General Motors Corporation and the International Union, United Automobile Aerospace and Agricultural Implement Workers of America which was effective December 13, 1976, as modified November 22, 1976, and is specifically designated as Exhibit A to Agreement between General Motors Corporation and U.A.W. This Agreement is still effective to this date.

7. The General Motors Corporation is responsible for the maintenance, management and performance of the Pension Plan.

8. Plaintiffs completed and filed the written application and complied with all required provisions to receive pension benefits.

9. All applications and requirements were complied with by the plaintiffs and accepted by the Division of the General Motors Corporation.

10. Plaintiff, Henry Buczynski became eligible for benefits under the Pension Plan on January 1, 1972.

Plaintiff, Alex Borusovic became eligible for benefits under the Pension Plan on March 31, 1973.

All other plaintiffs in this action became eligible for benefits under the Pension Plan prior to July 14, 1977.

11. Article IV, Section 2 of the Supplemental Agreement covering the Pension Plan, more specifically Exhibit

A to the Agreement between the General Motors Corporation and Local 736 of International Union, United Automobile Aerospace and Agricultural Implement Workers of America deals with deduction from the employees pension for Workers' Compensation and reads as follows in whole:

> "In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority."

12. Plaintiff, Henry Buczynski filed a Claim Petition for Workers' Compensation Benefits on June 25, 1976.

Plaintiff, Alex Borusovic filed a Claim Petition for Workers' Compensation Benefits on July 2, 1976.

All other plaintiffs in this action filed Claim Petitions for Wokers' Compensation Benefits prior to July 14, 1977.

13. Plaintiff, Henry Buczynski received a Judgment from his Workers' Compensation Claim on April 7, 1977, entitling him to approximately $2,500.00 (a copy of the judgment is attached herewith).

Plaintiff, Alex Borusovic received a Judgment from his Workers' Compensation Claim on February 11, 1977, entitling him to approximately $2,300.00 (a copy of the Judgment is attached herewith).

All other plaintiffs in this action received Judgments from their respective Workers' Compensation Claims entitling them to various amounts of money for permanent disability.

14. On or about June 22, 1977, plaintiff Henry Buczynski received an Authorization of Adjusted Monthly Benefits calling for an offset or deduction of his Pension Benefits from August 1, 1977, through January 1, 1978. (a copy of the Authorization of Adjusted Monthly Benefits is attached herewith).

On or about June 22, 1977, plaintiff Alex Borusovic received an Authorization of Adjusted Monthly Benefits calling for an offset or deduction of his Pension Benefits from August 1, 1977, through January 1, 1978. (a copy of the Authorization of Adjusted Monthly Benefits is attached hereto).

All other plaintiffs in this action have received Authorizations of Adjusted Monthly Benefits which indicate the

intent of the defendant to reduce the monthly pension benefit of the plaintiffs.

15. On July 14, 1977, an act concerning Workers' Compensation and amending R.S. 34:15-29, specifically Assembly No. 1309 was signed into law by Governor Brendan Byrne (a copy is attached herewith). This law prohibits deduction from an individuals pension for the right of compensation granted by chapter 34:15-29.

16. Defendant's intention to reduce the pension benefits of plaintiffs Henry Buczynski and Alex Borusovic as well as all other plaintiffs similarly situated is unlawful and will interfere with the plaintiffs' right to collect those monies which the plaintiffs are entitled to.

17. Defendant's intent to reduce the pension benefits of plaintiffs, Henry Buczynski and Alex Borusovic as well as all other plaintiffs similarly situated will create an immediate financial hardship to the plaintiffs.

18. Defendant's intent to reduce the pension benefits of the plaintiffs is unlawful and in violation of Assembly Bill No. 1309.

19. Plaintiffs are entitled to the privilege of receiving and enjoying those monies which they are entitled to under Article II, Section 5 of the Supplement Agreement covering the Pension Plan. Defendant will be depriving and preventing the plaintiffs from the use of those monies thereby do plaintiffs immediate substantial and irreparable harm.

20. The unlawful acts complained of herein will be continued in the future as a means of coercion and duress unless the acts are restrained by this Court.

21. The defendant, General Motors Corporation has and is at the present time advising plaintiffs with pending claims for Workers' Compensation Benefits that their pension benefits will be reduced when plaintiffs receive a judgment from their Workers' Compensation Claims.

22. The character and extent of injury to the plaintiffs is such that damages cannot adequately compensate for the same and plaintiffs have no adequate remedy at law.

23. The unlawful acts of the defendant, General Motors Corporation showing intent to withhold and refusal to pay pension benefits to the plaintiffs is likely to continue unless restrained.

24. As to each item of relief requested and granted greater injury will be inflicted upon the plaintiffs by the denial thereof than will be inflicted upon the defendant by granting thereof.

25. Unless a temporary restraining order will be issued without further notice, immediate substantial and irreparable injury to the plaintiffs will be unavoidable.

WHEREFORE, plaintiffs demand:

1. That the defendant be temporarily and permanently enjoined and restrained as follows:

(A) From withholding any pension monies to which the plaintiffs are entitled to receive.

(B) Permanently enjoining the defendant from directly or indirectly fostering or causing the use or implementation

of Article IV, Section 2 of the Pension Plan now in existence.

(C) Permanently enjoining the defendant, General Motors Corporation from directly or indirectly fostering or causing the use or implementation of a plan which results in the withholding of any pension monies to which the plaintiffs are entitled.

(D) Permanently enjoining the defendant from threatening or coercing plaintiffs in any manner with respect to plaintiffs pension being affected due to their pending Workers' Compensation Claims.

(E) Granting to the plaintiffs such other relief as may be just and equitable.

(F) Awarding to plaintiffs costs of this action.

WEINER, MIRABELLI & GLENNON
By: MARC C. GETTIS
Attorney for Plaintiffs

Complaint

[Official Copy Reprint]

ASSEMBLY, No. 1309

STATE OF NEW JERSEY

Introduced January 19, 1976

By Assemblymen Jackman and Pellecchia

Referred to Committee on Labor, Industry and Professions

AN ACT concerning workmen's compensation and amending R.S. 34:15-29.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. R.S. 34:15-29 is amended to read as follows:

34:15-29. The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment *[, *and shall not be set off or deduced from pension benefits or payments*]* **The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.***

2. This act shall take effect immediately.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Signed by Governor Byrne on Thursday, July 14, 1977.

[Other Exhibits and Affidavits Omitted]

Petition for Removal

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY:

The Petition of General Motors Corporation, for removal of this action from the Superior Court of New Jersey, Chancery Division, Union County, to the United States District Court for the District of New Jersey, respectfully shows to this Honorable Court:

1. That your Petitioner, General Motors Corporation, is the defendant in a civil action brought against it in the Chancery Division of the Superior Court of the State of New Jersey, Union County, entitled, "Henry Buczynski, Alex Borusovic and other retirees similarly situated, Plaintiffs, vs. The General Motors Corporation, Defendant," a copy of the complaint (and annexed Affidavits) and Order to Show Cause in which action are annexed hereto and made parts hereof as Exhibits A and B, respectively, the same constituting all the process, pleadings, and orders served upon your Petitioner in said action.

2. That the aforesaid action was commenced by the filing of said Complaint and Order to Show Cause on August 5, 1977, said Complaint and Order to Show Cause having been received by your Petitioner on August 9, 1977.

3. That your Petitioner was, at the time of the commencement of the aforesaid action, and now is, a cor-

poration duly organized and existing under and by virtue of the laws of the State of Delaware, and an employer and the administrator of an employee pension benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, and was and is engaged in commerce within the meaning of Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a).

4. That the aforesaid action is a suit alleging a violation of the rights of the plaintiffs under a contract between an employee and a labor organization representing employees in an industry affecting commerce and an action by a participant or beneficiary of an employee pension benefit plan to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan, within the meaning of Section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(a), and a civil action of which the United States District Courts have original jurisdiction under and pursuant to the provisions of Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. §185(a), Section 502(e) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1), and 28 U.S.C. §1331, and a civil action which may be removed to this Court pursuant to the provisions of 28 U.S.C. §1441.

5. That your Petitioner files and presents herewith a bond, with good and sufficient surety, in the penal sum of Five Hundred Dollars ($500.00), conditioned, as required by 28 U.S.C. §1446(d), that Petitioner will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this cause is not removable or is improperly removed.

Petition for Removal

WHEREFORE, your Petitioner prays that this cause proceed in this Court as an action properly removed thereto.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant-Petitioner
General Motors Corporation
By LAURENCE REICH
A Member of the Firm

Dated: August 9, 1977

Answer

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

Defendant, General Motors Corporation, by way of answer to the Complaint of the plaintiff herein, says that:

1. It admits that it has places of business at 1300 Raritan Road, Clark, New Jersey, 1016 West Edgar Road, and Parkway Avenue, Trenton, New Jersey, and that plaintiffs Henry Buczynski and Alex Borusovic were formerly hourly employees of defendant; except as so admitted, it neither admits nor denies the allegations of paragraph 1.

2. It admits the allegations of paragraph 2.

3. It has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3, and, therefore, it neither admits nor denies the same.

4. It admits that the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is recognized by it as the collective bargaining representative of all or substantially all of its hourly-rated production and maintenance employees at its New Departure—Hyatt Bearings Division plant at Clark, New Jersey, its GM Assembly Division plant at Linden, New Jersey, and its Fisher Body Division at Trenton, New Jersey; except as so admitted, it neither admits nor denies the allegations of paragraph 4.

5. It admits that plaintiff Alex Borusovic was employed by it on or about July 16, 1951, and retired from its em-

ploy effective April 1, 1973, and that plaintiff Henry Buczynski was employed by it on October 10, 1938, and retired from its employ effective January 1, 1972; except as so admitted, it has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 and, therefore, it neither admits nor denies the same.

6. It admits that on or about November 19, 1973, it entered into a Supplemental Agreement Covering the Pension Plan which is Exhibit A to an Agreement between it and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, of the same date, which Supplemental Agreement, as modified November 22, 1976, is presently in effect, and that there were agreements between it and said Union prior thereto covering the same subject matter; except as so admitted, it neither admits nor denies the allegations of paragraph 6 and refers to said Supplemental Agreement for accuracy as to the contents thereof.

7. It neither admits nor denies the allegations of paragraph 7, and refers to the aforesaid Supplemental Agreement for accuracy as to the contents thereof.

8. It admits the allegations of paragraph 8 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

9. It admits the allegations of paragraph 9 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

Answer

10. It admits the allegations of paragraph 10 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic, except that plaintiff Alex Borusovic became eligible for benefits April 1, 1973; except as so admitted, it neither admits nor denies the allegations thereof.

11. It admits that paragraph 11 sets forth the text of Section 2 of Article IV of the aforesaid Supplemental Agreement; except as so admitted, it neither admits nor denies the allegations of said paragraph 11 and refers to said Supplemental Agreement for accuracy as to the contents thereof.

12. It admits the allegations of paragraph 12 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

13. It admits the allegations of paragraph 13 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

14. It admits the allegations of paragraph 14 to the extent that the same refer to plaintiffs Henry Buczynski and Alex Borusovic; except as so admitted, it neither admits nor denies the allegations thereof.

15. It admits that on July 14, 1977, Assembly Bill No. 1309 was signed by the Governor of the State of New Jersey and thereby became Chapter 156 of the Public Laws of the State of New Jersey of 1977 and that the copy of Assembly Bill No. 1309 annexed to the Complaint sets forth

in substance the contents thereof; except as so admitted, it neither admits nor denies the allegations of paragraph 15 and refers to said Assembly Bill No. 1309 for accuracy as to the contents thereof.

16. It denies the allegations of paragraph 16.

17. It denies the allegations of paragraph 17.

18. It denies the allegations of paragraph 18.

19. It denies the allegations of paragraph 19.

20. It denies the allegations of paragraph 20.

21. It denies the allegations of paragraph 21.

22. It denies the allegations of paragraph 22.

23. It denies the allegations of paragraph 23.

24. It denies the allegations of paragraph 24.

25. It denies the allegations of paragraph 25.

First Separate Defense

The Complaint fails to state a claim upon which relief may be granted by this Court.

Second Separate Defense

Plaintiffs are barred and estopped by the action of their duly authorized collective bargaining representative in en-

tering into the Supplemental Agreement Covering the Pension Plan which is Exhibit A to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 19, 1973, as modified November 22, 1976, from contending herein that defendant may not make deductions conforming to the provisions of Section 2 of Article IV thereof.

THIRD SEPARATE DEFENSE

1. The Supplemental Agreement Covering Pension Plan which is Exhibit A to the Agreement between General Motors Corporation and the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, dated November 19, 1973, as modified November 22, 1976, is an employee benefit plan described in Section 4(a) of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. §1003(a), and not exempt under Section 4(b) of ERISA, 29 U.S.C. §1003(b).

2. By reason of the foregoing, the provisions of ERISA supersede the provisions of Section 34:15-29 of the Revised Statutes of the State of New Jersey, as amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977.

3. By reason of the foregoing, plaintiffs are barred and estopped from asserting that any actions taken by defendant, General Motors Corporation, pursuant to the provisions of Section 2 of Article IV of said Supplemental Agreement, violates the provisions of Section 34:15-29 of the Revised Statutes of the State of New Jersey, as

amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977, or any other law of the State of New Jersey.

FOURTH SEPARATE DEFENSE

1. Defendant, General Motors Corporation, is an employer engaged in commerce within the meaning of the provisions of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §151 *et seq.*

2. By reason thereof, the provisions of said Act preempt and supersede any state laws applicable to collective bargaining agreements negotiated between employers and the collective bargaining representatives of their employees, including specifically, but not limtied to, Section 34:15-29 of the Revised Statutes of the State of New Jersey, as amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977.

3. By reason of the foregoing, plaintiffs are barred and estopped from asserting that any actions taken by defendant, General Motors Corporation, pursuant to the provisions of Section 2 of Article IV of said Supplemental Agreement, violates the provisions of Section 34:15-29 of the Revised Statutes of the State of New Jersey, as amended by Chapter 156 of the Public Laws of the State of New Jersey of 1977, or any other law of the State of New Jersey.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By LAURENCE REICH
A Member of the Firm

Dated: September 13, 1977

Stipulation dated December 5, 1977

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

IT IS, on this 5th day of December, 1977, Stipulated and Agreed, by and between the undersigned counsel for plaintiffs and defendant in the above-entitled action, as follows:

1. Article IV, Section 2, of the General Motors Hourly-Rate Employes Pension Plan (hereinafter referred to as the "Pension Plan") as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 19, 1973, as modified November 22, 1976, is the same provision as that contained in Article IV, Section 2, of the predecessor Pension Plans constituting Exhibit A-1 to the Agreements between said parties, dated November 19, 1973, and November 11, 1970, except that the 1970 version thereof included the words "to an employee who retires with benefits payable for months commencing on or after April 1, 1971," following the word "Plan." True copies of Article IV, Section 2, as it appeared in the 1970, 1973, and 1976 versions of the Pension Plan are annexed hereto and made part hereof as Exhibits A, B, and C, respectively.

2. The application of Article IV, Section 2, of the Pension Plan to a particular retired employee is determined by the effective date of his retirement. Any employee who retired with benefits for months commencing on or after April 1, 1971 would be subject to the provisions of Article

IV, Section 2, as constituted in the 1970, 1973, and 1976 versions of the Pension Plan.

LESTER WEINER
Attorney for Plaintiffs

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

EXHIBIT A

Art. IV, 1(b)

therein, shall be considered as benefits for age or disability under the Federal Social Security Act for the purposes of the Plan.

(c) If an employe is eligible for a Federal Social Security benefit for disability or an unreduced Federal Social Security benefit for age at the time of retirement or thereafter, such employee shall provide the Corporation with evidence of the effective date of entitlement to such benefit.

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan to an employe who retires with benefits payable for months commencing on or after April 1, 1971, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe

by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

EXHIBIT B

Art. IV, 1(c)

retirement or thereafter, such employe shall provide the Corporation with evidence of the effective date of entitlement to such benefit.

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law,

equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

Article V

Financing

Section 1. Trust Fund

The Corporation shall execute a trust agreement with a trustee or trustees selected by the Corporation to

retirement or thereafter, such employee shall provide the Corporation with evidence of the effective date of entitlement to such benefit.

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

Article V

Financing

Section 1. Trust Fund

The Corporation shall execute a trust agreement with a trustee or trustees by the Corporation to

Memorandum Opinion dated February 17, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 77-1644

I. Introduction

The instant action was originally commenced in the Superior Court of the State of New Jersey, Chancery Division, Union County. It was removed by the defendant to this court pursuant to 28 U.S.C. § 1441,[1] after which the plaintiffs moved for a temporary restraining order on the basis of their complaint in the state action. At that point, the Attorney General of the State of New Jersey moved to intervene.[2] Subsequently, the court informed

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[1] 28 U.S.C. § 1441 provides in pertinent part that:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

[2] The Attorney General of the State of New Jersey submitted a memorandum of law to the court going to the merits of plaintiffs' motion for a preliminary injunction, which has been fully considered by this court. The court has also taken into account the oral argument made before this court by a representative of the Attorney General which also went to the merits of plaintiffs' motion for a preliminary injunction.

the parties of its intention to treat plaintiffs' motion as one for a preliminary injunction, and the parties agreed thereto. A hearing was held, at which time the parties were given an opportunity to present evidence in support of their respective positions. Thereafter, plaintiffs moved to have their action certified as a class action[3]. The parties have supplemented the record of this case with a stipulation of facts.

Thus, three motions are presently pending before this court: (1) plaintiffs' motion for a preliminary injunction; (2) the Attorney General's motion to intervene; and (3) plaintiffs' motion to have the instant action certified as a class action. These motions wll be considered seriatim.

II. The Motion for a Preliminary Injunction

On a motion for a preliminary injunction the moving party must demonstrate (1) a reasonable probability of eventual success in the litigation and (2) that he will be irreparably injured *pendente lite* if the motion is denied. Two other factors which will be weighed, when relevant, are (3) the possibility of harm to other interested persons from the grant or denial of the injunction and (4) the public interest. *Oburn* v. *Shapp,* 521 F.2d 142, 147 (3d Cir. 1975).

The two named plaintiffs in this action are retired employees of the defendant, General Motors Corporation. After they retired, they began receiving monetary payments from the defendant pursuant to a pension plan

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[3] The plaintiff and defendant have signed a consent order certifying the present action as a class action under Fed.R.Civ.P. 23 and have submitted the order to this court for its approval.

agreement[4] negotiated between the defendant and plaintiffs' union, the International Union, United Automobile Aerospace and Agricultural Implement Workers of America. The pension plan provides in relevant part as follows:[5]

> In determining the monthly benefits payable under this Plan to an employe who retires with benefits payable for months commencing on or after April 1, 1971, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employe by reason

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[4] The parties have stipulated that "the application of . . . [a] Pension Plan to a particular retired employee is determined by the effective date of his retirement." Stipulation, ¶2. Consequently, this court concludes that plaintiffs' pension rights were negotiated while the plaintiffs were still employees of the defendant, and that those rights were not renegotiated by the union on behalf of the plaintiffs after the plaintiffs retired. From that, this court concludes as a matter of law that the pension plan which governs the rights and liabilities of the plaintiffs is the pension plan which was in effect at the time the plaintiffs retired. *Allied Chemical & Alkali Workers* v. *Pittsburgh Glass Co.,* 404 U.S. 157, 181 n.20 (1971); *Hurd* v. *Hutnik,* 419 F.Supp. 630, 654 (D.N.J. 1976).

Plaintiff Buczynski retired on January 1, 1972, and plaintiff Borusovic retired on April 1, 1973. At the time they retired, a pension plan was in effect which had been negotiated and agreed upon by the defendant and plaintiffs' union on November 11, 1970. The pension plan, rather than the two subsequent pension plans, dated November 19, 1973 and November 22, 1976, is the plan which governs the rights and liabilities of the plaintiffs.

[5] Pension Plan of November 11, 1970, Article 1, Section 2. *See* n.4, *supra.*

of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (emphasis added)

Each of the plaintiffs recovered a worker's compensation award pursuant to New Jersey's Worker's Compensation Act, N.J.S.A. 34:15, and each of the plaintiffs' pension benefits was reduced by the defendant in accordance with the above-quoted provision of the pension plan.

The plaintiffs seek a preliminary injunction enjoining the defendant from making the deductions in their retirement pension benefits on the ground that a recently enacted amendment to New Jersey's Worker's Compensation Act

outlaws such deductions[6]. That amendment provides as follows[7]:

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[6] The plaintiffs do not contend that the defendant is making deductions contrary to the three exceptions of subdivisions (a), (b) and (c) of Article IV, Section 2, of the Pension Plan. Rather, the plaintiffs argue that the deductions are being made in violation of the "unless prohibited by law" language of Article IV, Section 2 of the Pension Plan. Plaintiffs' theory is that the recently enacted amendment to New Jersey's Worker's Compensation Act outlaws the deductions being made by the defendant, and that defendant is therefore in breach of the pension plan agreement, which provides that such deductions can be made "unless prohibited by law."

The plaintiffs' action, then, is one for breach of a collective bargaining agreement, pursuant to the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), which provides that:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Suits for breach of a collective bargaining agreement are governed by federal law and "arise under" a federal statute, the National Labor Relations Act, as amended. *Avco Corp.* v. *Aero Lodge No. 735, International Ass'n of Machinists and Aerospace Workers,* 390 U.S. 557 (1968).

Since plaintiffs' cause of action "arises under" a federal statute, and since this court would have had original jurisdiction over that cause of action had plaintiffs chosen to institute suit in this court in the first instance, this court has removal jurisdiction under 28 U.S.C. § 1441(a), (b). *See* n.1, *supra.*

[7] Assembly Bill No. 1309, enacted into law on July 14, 1977.

Memorandum Opinion dated February 17, 1978

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. R.S. 34:15-29 is amended to read as follows:

34:15-29. The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments, but shall not be set off against employees' retirement pension benefits or payments.*

2. This act shall take effect immediately.

The defendant admits that the deductions it is making in plaintiffs' retirement pension payments are violative of the above-quoted New Jersey statute. However, the defendant contends that the statute is unconstitutional under the Supremacy Clause of the United States Constitution in that it is pre-empted by two federal statutes, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (ERISA), and the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 151 *et seq.* (NLRA).

If the New Jersey statute is pre-empted by either of those federal statutes, the defendant is acting properly pursuant to the terms of the collective bargaining agreement with plaintiffs' union, and plaintiffs' motion for a preliminary injunction must be denied. If, on the other hand, the New Jersey statute is not pre-empted by either

of those federal statutes, the defendant is in breach of its collective bargaining agreement with plaintiffs' union,[8] and plaintiffs would be entitled to the injunctive relief they seek, provided that the other three factors to be considered on a motion for a preliminary injunction weigh in favor of the plaintiff. *Oburn* v. *Shapp, supra.*

This court, however, need not decide at this time whether the New Jersey statute is pre-empted by ERISA or the NLRA, since it is clear that plaintiffs' motion for a preliminary injunction must be denied on the ground that they have failed to demonstrate that they will be irreparably injured *pendente lite* if their motion is not granted. Should it eventually be determined that the plaintiffs are entitled to a permanent injunction against the deductions presently being made in their retirement pension benefits, they can be reimbursed for the money lost during the period of the wrongful withholding. *See generally,* Leubsdorf, "The Standard for Preliminary Injunctions," 91 Harv.L.Rev. 525 (1978).

Accordingly, the plaintiffs' motion for a preliminary injunction is denied.

III. The Attorney General's Motion to Intervene

The Attorney General of the State of New Jersey has moved to intervene to defend the constitutionality of the recent amendment to N.J.S.A. 34:15-29, which the defendant contends is pre-empted by federal law under the Supremacy Clause of the United States Constitution.

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[8] *See* n.6, *supra.*

Memorandum Opinion dated February 17, 1978

Rule 24(b) of the Federal Rules of Civil Procedure provides as follows:

> (b) Permissive Intervention. . . . When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The first sentence of the above quotation was added in 1948 to codify the case of *Securities Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434 (1940), in which the Supreme Court sanctioned official intervention in behalf of the public interest, and to avoid "exclusionary constructions" of Rule 24(b) which some lower courts continued to put on that rule after *Securities Exchange Commission.* 7A Wright & Miller, Federal Practice and Procedure, § 1912, at 547-48.

It is clear that the plaintiffs' claim is grounded upon a state statute, N.J.S.A. 34:15-29, as amended. It is equally clear that the Attorney General of the State of New Jersey has an interest in defending that statute from a constitutional attack made by the defendant. Since intervention by the Attorney General will not "unduly delay or prejudice the adjudication of the rights of the original parties," Fed.R.Civ.P. 24(b), the motion of the Attorney General to intervene is granted. [*See Miami Health Studios, Inc.*

v. *City of Miami Beach,* 491 F.2d 98 (5th Cir. 1974) (intervention of a state attorney general).] *See* Fed.R.Civ.P. 24 (a); 28 U.S.C. §2403(b).

IV. The Motion for Class Action Certification

The parties have submitted a consent order to this court for its approval. The consent order provides as follows:

> ORDERED that this action shall be and is certified as a class action under Rules 23(b)(1) and/or Rule 23(b)(2) of the Federal Rules of Civil Procedure.
>
> It is further ORDERED that the class shall be and is certified as those persons who were employed in New Jersey by General Motors Corporation who are participants in the General Motors Corporation Hourly Rate Employees' Pension Plan who have been, since July 14, 1977, or may hereafter be subject to deductions under Section 2 of Article IV of such Pension Plan from pension benefits payable to them other than disability pension benefits.
>
> It is further ORDERED that the two named plaintiffs, Henry Buczynski and Alex Borusovic, are hereby certified as the representatives of the class.

The court agrees with the parties that the present action should properly be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. However, before the court decides which subdivision of Rule 23 is applicable, and the appropriate class to be certified, I will wish to have the benefit of counsels' written submissions and oral argument. Please address yourselves to what subdivisions of Rule 23 are applicable and why, the mechanics

of notice, and the proper class. With regard to the subject of the proper class, I note that the parties have stipulated that Article IV, Section 2 of the General Motors Hourly-Rate Employes Pension Plan dated November 11, 1970 is identical to Article IV, Section 2 of the Pension Plan dated November 19, 1973 and of the Pension Plan dated November 22, 1976, except that the November 11, 1970 version contains the words "to an employe who retires with benefits payable for months commencing on or after April 1, 1971," following the word "Plan." In other words, all three Pension Plans are the same in all material respects. This raises the question of whether the class should include all retired employees of General Motors who are subject to either the 1970 Pension Plan, the 1973 Pension Plan or the 1976 Pension Plan, and who were employees of General Motors in New Jersey at the time they retired.

You may be able to agree upon a joint submission. In any event, I will want briefs exchanged by February 27, 1978. Oral argument is set down for March 6, 1978 at 9 a.m.

You should also confer and advise the court of whether additional testimony on either side will be required. Among other things, you may wish to consider whether testimony should be offered concerning the history of negotiations relating to the "deduction" language, including the "unless prohibited by law" phrase.

FREDERICK B. LACEY
United States District Judge

Dated: February 17, 1978

Pretrial Order dated April 13, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

April 13, 1978

Newark, New Jersey

Before the Honorable William J. Hunt
United States Magistrate

Appearances:

Marc C. Gettis, Esquire
Lester Weiner & Associates
For Plaintiffs.

Laurence Reich, Esquire
Carpenter, Bennett & Morrissey
For Defendant

1. NATURE OF THE ACTIONS This is an action for injunctive relief against the implementation by defendant of the provisions of Article IV, Section 2, of the General Motors Corporation Hourly-Rate Employees Pension Plan so as to deduct certain New Jersey Workers Compensation Act benefits payable to plaintiffs and other members of the class represented by plaintiffs from retirement benefits payable to such person under such Pension Plan. This is an action removed pursuant to 28 U.S.C. §1441 of which this Court has jurisdiction pursuant to 28 U.S.C. §1332, by reason of the provisions of Section 301(a), and Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(e)(1).

Pretrial Order dated April 13, 1978

2. EXHIBITS, ADMISSIONS AND STIPULATIONS: Not later than May 8, 1978, counsel will meet and confer and accomplish the following:

(a) All exhibits are to be premarked and each side is to prepare his or its own exhibit list in the usual form used in this court.

(b) A complete set of exhibits is to be exchanged and admissibility agreed upon. Where agreement cannot be reached, the side offering the document should set forth in letter form the exhibit being tendered, why it is admissible, and the objections thereto. This is to be presented to the Honorable Frederick B. Lacey at the time of submission of trial memoranda.

(c) Each side is to come to the aforesaid meeting with his or its proposals for stipulation he or it seeks and at the conclusion of the meeting a stipulation of facts is to be prepared and signed by all counsel and filed with the Clerk of the United States District Court not later than May 10, 1978.

3. FACTUAL AND LEGAL CONTENTIONS OF PLAINTIFFS: See attached.

4. FACTUAL AND LEGAL CONTENTIONS OF DEFENDANT: See attached.

4A. FACTUAL AND LEGAL CONTENTIONS OF THE INTERVENOR, STATE OF NEW JERSEY: None submitted.

5. CLAIMS AS TO DAMAGES: Plaintiffs' request injunctive relief, enjoining and restraining the defendant from implementing Article 4, Section 2 of the Pension Plan. Each

individual plaintiff should be entitled to damages in the amount of the deductions which have been made from his pension. Plaintiffs also seek costs from defendant in this action.

6. AMENDMENTS TO THE PLEADINGS: On February 21, 1978, the Honorable Frederick B. Lacey ordered that the State of New Jersey may intervene as a defendant herein. On March 26, 1978, the court granted the plaintiffs' motion to certify this action as a class action.

7. LEGAL ISSUES: Validity and enforceability of N.J.S.A. 34:15-29, as amended by Chapter 156 of Public Laws of the State of New Jersey of 1977 in view of preemption by the provisions of Section 514(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a); propriety of injunctive relief, damages.

8. LEGAL ISSUES ABANDONED: None.

9. ADDITIONAL DISCOVERY: None.

10. BRIEFS: Counsel are to submit not later than May 10, 1978, comprehensive trial memoranda setting forth in detail the names of the witnesses each intends to call, the background of each witness, and a detailed recital of the testimony each witness will give. Each memorandum will also contain in its factual portion an analysis of all the documentation which will be submitted. Each memorandum will deal comprehensively as well with applicable law. Preliminaray proposed findings of fact and conclusions of law will accompany the submission of trial memoranda.

11. MOTIONS: The parties may file cross-motions for summary judgment.

Pretrial Order dated April 13, 1978

12. Opening and Closing: Usual order.

13. Expert Witnesses: None.

14. Estimated Length of Trial: Counsel have noted in their respective pretrial memoranda that this action can be determined on the pleadings, affidavits, and the stipulation before the court as well as on the briefs and oral argument.

15. Trial Counsel:

For the Plaintiffs: Lester Weiner & Associates

For the Defendant General Motors: Laurence Reich, Esq.

For the Defendant State of New Jersey: Michael S. Bokar, Esq.

16. Trial Date: This matter has been listed for trial before the Honorable Frederick B. Lacey on May 15, 1978.

William J. Hunt
United States Magistrate

Factual Contentions of Plaintiffs

This is a class action brought by plaintiffs against General Motors Corporation. The class consists of those persons who are retired members of the General Motors Corporation Hourly Rate Retirees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automo-

bile, Aerospace and Agricultural Implement Worker's of America, dated November 11, 1970, November 19, 1973 or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971 and who at the time of their retirement, were employed by General Motors Corporation in New Jersey. The defendant has deducted and continues to deduct from plaintiffs' retirement pensions (General Motors Hourly Rate Retirees Pension Plan Exhibit A to agreement between General Motors Corporation and UAW) in the amounts of judgments which these plaintiffs have collected from defendant for occupational injuries, in the New Jersey Department of Labor and Industry, Division of Worker's Compensation.

Article IV, Section 2 of the Pension Plan allows such deductions, "unless prohibited by Law." Chapter 156 of the New Jersey Laws of 1977 prohibits these deductions. The defendant has continued to make said deductions, alleging that the New Jersey statute is preempted under section 514(a) of E.R.I.S.A. and under section 301 of the N.L.R.A.

Plaintiffs contends that this action is not preempted by section 514(a) of E.R.I.S.A., but rather fits within the exception of section 514(b) of E.R.I.S.A., in that plaintiffs have causes of action which arose prior to January 1, 1975 and defendant committed certain acts and omissions before January 1, 1975. The defendant's acts and omissions consisted of operating their three New Jersey plants where the plaintiffs were exposed to loud noise and deleterious substances, resulting in compensable disabilities. Plaintiffs collected for these disabilities, but defendant subsequently deducted these amounts from plaintiff's pensions. The plaintiffs are before this Court in an attempt

to re-coup these same monies and to enjoin defendant's conduct.

Plaintiffs contend that the State statute is not preempted under the N.L.R.A. The Statute is not contrary to the agreement between the parties but rather is incorporated therein under the "unless prohibited by law" clause. The statute was enacted for the purpose of regulating Worker's Compensation, an area of local interest and responsibility, where the State still has the power to act and regulate. The law is a legislative attempt to guarantee workers their rights under the Worker's Compensation laws.

Plaintiffs also contend that preemption of the state statute would deprive these plaintiffs of any legal remedy for injuries arising in the course of employment. Worker's Compensation laws abrogate any common law right. Preemption of the statute would effectively deny plaintiffs their rights under Worker's Compensation, since any payments thereunder could be offset against the employees pensions.

Since Chapter 156 of the laws of 1977 is a proper exercise of State power and is not preempted under Federal Law, the defendant has been acting in violation of the law.

Injunctive relief is the proper remedy for the plaintiffs in this action. For most of these plaintiffs, the monthly pension is the sole source of income, with the exception of Social Security. Deductions from pension benefits is causing these plaintiffs irreparable harm for which an injunction is the appropriate remedy.

Pretrial Order dated April 13, 1978

FACTUAL AND LEGAL CONTENTIONS

The applicable facts herein are not disputed. At all times since April 1, 1971, to and including the date hereof, the General Motors Corporation Hourly-Rate Employes Pension Plan (hereinafter referred to as the "Pension Plan") adopted by defendant and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, applicable to plaintiffs and other members of the class represented by plaintiffs, as provided, in Article IV, Section 2 thereof, for the deduction from benefits otherwise payable under the Pension Plan of certain Workmen's Compensation payments payable to a retired employee thereunder. Such deductions have been made by defendant in accordance with such provision of the Pension Plan, both prior and subsequent to July 14, 1977, the date of enactment and effective date of Chapter 156 of the Public Laws of the State of New Jersey of 1977, which amended the New Jersey Workers Compensation Act, N.J.S.A. 34:15-29, to provide that:

> "The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments."

Plaintiffs contend that defendant is prohibited by N.J.S.A. 34:15-29, as amended, from making deductions from retirement pension benefits otherwise payable to plaintiffs and other members of the class represented by plaintiffs after July 14, 1977 pursuant to Section 2 of Article IV of the Pension Plan. Defendant contends that insofar as it purports to apply to the Pension Plan, which is an employee benefit plan described in Section 4(a) of the Employee Retirement Income Security Act of 1974,

Pretrial Order dated April 13, 1978

P.L. 93-406 (hereinafter referred to as "ERISA"), 29 U.S.C. §1003(a), and not exempt under Section 4(b) of ERISA, 29 U.S.C. §1003(b), N.J.S.A. 34:15-29, as amended by Chapter 156 of the Laws of 1977, is superseded and preempted by reason of the provisions of Section 514(a) of ERISA, 29 U.S.C. §1144(a). Therefore, N.J.S.A. 34:15-29 may not be applied so as to preclude deductions by defendant from retirement pensions of plaintiffs and other members of the class represented by plaintiffs in accordance with the provisions of Section 2 of Article IV of the Pension Plan.

Stipulation, dated May 9, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

IT IS, on this 9th day of May, 1978, STIPULATED AND AGREED, by and between the undersigned counsel for plaintiffs and defendant in the above-entitled action, as follows:

1. The Stipulation of the parties dated December 5, 1977 and filed herein December 7, 1977, be and it hereby is incorporated herein by reference, and, the Pension Plans of which Exhibits A, B, and C thereto are part are hereby designated Joint Exhibits A, B, and C in this action.

2. Defendant is an employer engaged in commerce or in an industry or activity affecting commerce.

3. The plaintiffs herein are all persons formerly employed by defendant in New Jersey who, on various dates on or after April 1, 1971, retired from the employ of defendant under the provisions of the General Motors Hourly-Rate Employes Pension Plan (hereinafter and in the aforesaid Stipulation dated December 5, 1977 referred to as the "Pension Plan"). All of the named plaintiffs have received awards of benefits under the New Jersey Workers' Compensation Act. All of the named plaintiffs have had deductions made by defendant from the pension benefits otherwise payable to them under the Pension Plan since July 14, 1977 by reason of the receipt of such awards and in accordance with the provisions of Section 2 of Article IV of the Pension Plan.

Stipulation, dated May 9, 1978

4. It is stipulated and agreed, without any stipulation or agreement as to the relevance or significance thereof, that Joint Exhibits D and E are true copies of Section 2 of Article IV of the 1958 and 1961 Pension Plans, respectively.

LESTER WEINER
Attorney for Plaintiffs

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By LAURENCE REICH
A Member of the Firm

Order Certifying Class Action, dated August 9, 1978

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(Hon. Frederick B. Lacey)

Civil Action No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

—VS—

THE GENERAL MOTORS CORPORATION,

Defendant.

This matter having been opened to the Court by Lester Weiner, Esq., attorney for plaintiffs, on the application of plaintiffs for an order certifying the above-entitled action as a class action, and the Court noting the consent of the parties hereto to the entry of this Order, and good cause appearing,

IT IS, on this 9th day of August, 1978,

ORDERED, that this action be and it hereby is certified as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure; and it is

Order Certifying Class Action, dated August 9, 1978

FURTHER ORDERED, that the class be and it hereby is certified as consisting of those persons who are retired members of the General Motors Corporation Hourly-Rate Employes Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, datad November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey; and it is

FURTHER ORDERED, that the above-entitled action be and it hereby is set down for Pretrial Conference before Honorable William J. Hunt at 9:00 A.M. on April 10, 1978, and for trial before this Court on May 1, 1978.

FREDERICK B. LACEY, U.S.D.J.

We hereby consent to the making and entry of the foregoing Order.

LESTER WEINER
Attorney for Plaintiffs
By: MARC C. GETTIS

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

JOHN J. DEGNAN
Attorney General of the State of New Jersey
Attorney for Intervenor
By: MICHAEL S. BOKAR
Deputy Attorney General

Memorandum Opinion, dated August 24, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

Plaintiffs in this class action[1] are retired employees of defendant General Motors Corporation who had been re-

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[1] The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." See order filed August 9, 1978.

ceiving retirement pension benefits from the defendant pursuant to a pension plan negotiated between the defendant and plaintiffs' union. After the plaintiffs received worker's compensation payments pursuant to New Jersey's Worker's Compensation Act,[2] the defendants reduced the plaintiffs' benefits under the plan by an amount equal to those payments, pursuant to Article IV, Section 2, of the plan.

The plaintiffs contend that the defendant cannot lawfully make such deductions in their pension benefits. They seek reimbursement of all pension benefits thus withheld and a permanent injunction against all such future deductions which are predicated upon the receipt of worker's compensation payments.

For the reasons set forth below, the plaintiffs are entitled to the relief they seek.

Dealing first with the issue of subject matter jurisdiction in this removed matter, 28 U.S.C. § 1441, I conclude I have such jurisdiction to decide the issues. Even were there any question about the propriety of removal by the defendant, neither side has questioned it. Since it is clear I would have had original jurisdiction over the claims presented here, a valid judgment can be entered with respect to them.[3] *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 702 (1972).

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[2] N.J.S.A. 34:15 *et seq.*

[3] Thus, this court would have had original subject matter jurisdiction over the instant action under the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) and under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(f), 1132(a)(3).

Moreover, this court has removal jurisdiction over plaintiffs' state court action under 28 U.S.C. § 1441(a)(b), predicated upon 29 U.S.C. § 185(a).

Memorandum Opinion, dated August 24, 1978

The complaint as filed alleges that the plaintiffs are retired employees of the defendant, that they have been receiving pension benefits under a Pension Plan Agreement between their union and the defendant, that they have obtained judgments entitling them to worker's compensation benefits, and that the defendant threatens to reduce their pension benefits because they have recovered worker's compensation benefits. The complaint sets forth Article IV, Section 2 of the Pension Plan Agreement:

> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority. (emphasis added)

The complaint then alleges that the deductions threatened by the defendant are now in violation of a recent amendment to New Jersey's Worker's Compensation Act[4] which provides that:[5] "The right of compensation granted by this chapter may bet set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments." The complaint concludes with a prayer for a permanent injunction against the threatened deductions.

Plaintiffs' action, therefore, is predicated upon an alleged breach or violation of the "unless prohibited by law" clause of the Pension Plan Agreement.[6] Thus they argue that, since Article IV, Section 2 of the Pension Plan Agreement bars the defendant from offsetting pension benefits against worker's compensation benefits where "prohibited by law," and the New Jersey Worker's Compensation Act embodies such a prohibition, the continued deductions violate the express provisions of the Pension Plan Agreement.

The complaint did not advance a claim founded upon a theory that the offset provision is unlawful under ERISA. That claim was first raised indirectly when plaintiffs' counsel brought to this court's attention the recently decided

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[4] There is no allegation that defendant threatens to make the deductions in plaintiffs' pension benefits contrary to the three exceptions to the offset provision contained in subdivisions (a), (b), or (c) of Article IV, Section 2 of the Pension Plan Agreement.

[5] L. 1977, c. 156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29.

[6] Subsequent to the filing of the complaint, the defendant has been making the deductions in plaintiffs' pension benefits and has made it clear that it will continue to do so.

Utility Workers Union of America v. *Consumers Power Co.*, No. 7-71747 (E.D.Mich., filed June 13, 1978). The defendant's response was not a claim of prejudice by reason of a belated addition to plaintiffs' bag of legal theories of recovery.[7] Instead, the defendant responded by referring the court to another case[8] in the same court, the Eastern District of Michigan, which was decided contrary to the *Utility Workers* case.

The defendant, as I have noted, admits all of the material allegations necessary to a decision on the question of whether ERISA itself bars the offset involved, including that the pension plan falls within the coverage of ERISA. *See* 29 U.S.C. § 1003.

Thus, I perceive no prejudice to the defendant in addressing the issue of the lawfulness of the offsetting in question under 29 U.S.C. § 1053 of ERISA. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil, § 1219.[9]

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[7] The defendant contended only that the ERISA claim was "entirely outside the scope of the pleadings and proof now before the court" and that the *Utility Workers* case was therefore irrelevant. Letter to Court, dated July 26, 1978.

[8] *Bordine* v. *Evans Product Co.*, No. 7-71652 (E.D. Mich., filed April 6, 1978).

[9] Once a federal court has removal jurisdiction, a party may amend his complaint to assert a federal claim that could not have been presented in the state court. *Freeman* v. *Bee Machine Co.*, 319 U.S. 448 (1943). This court has removal jurisdiction over plaintiffs' breach of contract claim which was asserted in state court. *See* n.3 *supra*. Thus, under *Freeman*, the plaintiffs could have amended their complaint here to assert the unlawfulness of the offset provision under ERISA, 29 U.S.C. § 1053, a claim over which this court has original subject matter jurisdiction under 29 U.S.C. § 1132(f).

Memorandum Opinion, dated August 24, 1978

The Offset Provision of the Pension Plan Is Unlawful Under ERISA

The minimum vesting standards provision of ERISA, 29 U.S.C. § 1053, provides in pertinent part that:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefits is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).
>
> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.[10]

• • •

[10] Subparagraph (B) provides for an alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service. For example, an employee who has served at least 5 years would have a nonforfeitable right to 25% of his accrued benefit, while an employee who had served at least 15 years would have a nonforfeitable right to 100% of his accrued benefit.

(Footnote continued on following page)

Memorandum Opinion, dated August 24, 1978

In *Utility Workers,* it was held that a provision in a pension plan falling within the coverage of ERISA which provides that retirement pension benefits are to be offset against worker's compensation benefits is unlawful under ERISA, 29 U.S.C. § 1053. This court is in full agreement with the well-reasoned opinion in that case.[11]

Under ERISA, a pension plan must provide that an employee's rights in his accrued benefits derived from his own contributions is nonforfeitable.[12] The pension plan must also provide that an employee has a nonforfeitable right to a certain percentage of his accrued benefit derived

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(Footnote continued from preceding page)

Subparagraph (C) provides for yet a third alternate pension plan under which an employee can obtain a nonforfeitable right to an increasingly higher percentage of his accrued benefit derived from employer contributions depending upon his years of service and his age. For example, where an employee has served at least 5 years and the sum of his age and service is at least 45, he has a nonforfeitable right to 50% of his accrued benefit; but where an employee has at least 10 years of service and the sum of his age and service is at least 55, he has a nonforfeitable right to 100% of his accrued benefit.

It is immaterial whether plaintiffs' pension plan is one predicated upon subparagraph (A), (B), or (C) of 29 U.S.C. § 1053 (a)(2).

[11] This court rejects the contrary holding in the case of *Bordine, supra* note 9, at 4.

[12] ERISA does not provide for any exceptions to the nonforfeitability requirement in the case of accrued benefits derived from employee contributions.

from employer contributions,[13] the particular percentage depending upon (1) his years of service or (2) his years of service and his age.

When a pension plan, such as the one under consideration here, makes the employee's right to a certain percentage of his accrued benefit derived from employer contributions conditional upon a factor other than years of service or years of service and age, the plan is unlawful, unless the factor is one of those set forth in 29 U.S.C. § 1053(a)(3).

The pension plan herein makes the plaintiffs' rights to their accrued benefits conditional upon their not obtaining worker's compensation benefits. Such a factor is not one of those set forth in 29 U.S.C. § 1053(a)(3).[14] As a result, the pension plan is unlawful.[15]

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[13] The court will assume that plaintiffs' pension plan is fully funded by the defendant.

[14] 29 U.S.C. § 1053(a)(3) legalizes pension plans which provide that an employee's right to an accrued benefit is forfeitable if he dies, if he is employed in certain types of industries, if certain amendments are made retroactive, or if he withdraws any amount attributable to the benefit derived from mandatory contributions made by him.

[15] In addition to *Utility Workers, see also Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 (2d Cir. 1977).

Memorandum Opinion, dated August 24, 1978

The Offset Provision of the Pension Plan Is Void Under the "Unless Prohibited By Law" Clause of the Pension Plan

As noted previously, the Pension Plan Agreement between the defendant and the plaintiffs' union provides that retirement pension benefits may be offset against worker's compensation benefits "unless prohibited by law." At the final hearing in this case on May 15, 1978, the testimony established that after a number of years' absence from the General Motors' pension plan, the offset provision reappeared in the 1970 pension plan.[16] The testimony also established that it was the defendant which proposed the reinsertion of the offset provision into the pension plan because there had been a "deluge" of worker's compensation cases from which the defendant sought "relief."[17] The "unless prohibited by law" clause was also proposed by the defendant. The "unless prohibited by law" clause "meant just as the language indicated, pure and simple, that if there were states then having state laws which prohibited an offset and if in the future there would be state laws that prohibited offset that would be applicable and it was just that pure and simple.[18]

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[16] The offset provision was continued in the 1973 and 1976 pension plans. All three plans contain the "unless prohibited by law" clause. Stipulation of December 7, 1977.

[17] Testimony of Hubert Clodfelder, Union Negotiator, Hearing of May 15, 1978, Tr. at 8. The pension plan being negotiated was to apply to 130 General Motors' plants located in at least thirty states.

[18] *Id.* at 10.

The defendant admits that the deductions it is making in plaintiffs' retirement pension benefits are prohibited by the recent amendment to New Jersey's Worker's Compensation Act. The defendant contends, however, that that amendment is unconstitutional under the Supremacy Clause of the United States Constitution, in that it has been preempted by ERISA, 29 U.S.C. § 1144(a),[19] which provides that:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

As I have already indicated in the preceding section of this opinion, the offset provision of the pension plan is unlawful under ERISA, 29 U.S.C. § 1053. The New Jersey statute, insofar as it is merely duplicative of ERISA, is preempted by that federal statute. *Rogers* v. *Larson,* 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

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[19] The defendant also contends that the New Jersey statute is preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.* This contention, however, is without merit, since the parties specifically agreed that the offset provision of the pension plan would be inapplicable if it was prohibited by state law. By applying the recent amendment to New Jersey's Worker's Compensation Act to bar the offset of pension benefits against worker's compensation benefits, this court would be doing nothing more than enforcing the agreement between the parties reached after the give and take of collective bargaining.

However, assuming *arguendo* that ERISA does not outlaw the offset provision of the pension plan, it becomes necessary to determine whether the specific preemptive language of ERISA, 29 U.S.C. § 1144(a), renders the New Jersey statute null and void as applied to the facts of this case. If the New Jersey statute is not preempted by ERISA, the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the recent amendment to New Jersey's Worker's Compensation Act became effective on July 14, 1977.

In determining whether the New Jersey statute is pre-empted,[20] this court is guided by the opinion of the Court of Appeals for the Third Circuit in the case of *Rogers* v. *Larson, supra* at 620-21, wherein the court discussed the three preemption "tests":

> The Supreme Court has . . . established three grounds upon which a local statute may be deemed pre-empted by federal law. It will be pre-empted (1) if "Congress has unmistakenly so ordained," or (2) if "the nature of the regulated subject matter permits no other conclusion" but pre-emption, or (3) if it violates the Supremacy Clause by standing "as an obstacle to the accomplishment and execution of

[20] The court reiterates that this discussion is predicated upon the assumption that the offset provision of the pension plan is *not* unlawful under ERISA.

> the full purposes and objectives of Congress." (citation omitted)[21]

The touchstone of all three preemption tests is Congressional intent to preempt. *Rogers* v. *Larson, supra* at 621 n.8.

The defendant contends that the New Jersey statute is preempted under the first preemption test, in that Congress, through the specific preemptive language of ERISA, 29 U.S.C. § 1144(a), "unmistakenly" intended to preempt this state law.[22]

It is true that under ERISA, 29 U.S.C. § 1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New

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[21] With respect to the last two tests, the court explained that:

> We understand the second test to mean that the subject matter of the federal and local laws is such that the two laws or regulatory schemes must inherently either conflict or be duplicative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation.
>
> The third test is applied when there is room in the subject area for both federal and local regulation. This test requires the court to examine both statutory schemes to determine if they can co-exist or if they conflict.

Rogers v. *Larson*, 563 F.2d 617, 621 (3d Cir. 1977), appeal filed, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978).

[22] The defendant does not argue that the New Jersey statute is preempted under either preemption test (2) or (3). It is clear to this court that the statute is not preempted under either of those tests.

Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. § 1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. *See Allied Structural Steel Co.* v. *Spannaus,* 46 U.S.L.W. 4887, 4889 n.8 (U.S. June 28, 1978); *Malone* v. *White Motor Corp.,* 46 U.S.L.W. 4295 n.1 (U.S. April 3, 1978); *Marshall* v. *Chase Manhattan Bank,* 558 F.2d 680, 683 (2d Cir. 1977). However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. This is clear from the language of the statute itself. The statute provides that worker's compensation benefits may be set off against *disability* pension benefits, but not against *retirement* pension benefits. Thus, under the statute an employee is not entitled to double compensation for a work-related disability, once under the Worker's Compensation Act, and once under his pension plan. On the other hand, an employee *is* entitled to be compensated at least *once* for his work-related disability. It is self-evident that if an employee can receive compensation for his work-related disability under New Jersey's Worker's Compensation Act just to have an equal amount taken away from his retirement pension benefits, the employee, in reality, has been deprived of compensation for his work-related disability.[23] *Utility Workers Union*

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[23] It is obvious that an employer could not justify, upon any rational basis, giving one employee less retirement pension benefits than another employee solely on the basis that the former employee has a work-related disability while the latter does not.

of America v. *Consumers Power Co., supra,* slip op. at 16 n.12. The New Jersey statute forbids such a result.

Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. § 1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here. That Congress recognizes state law preeminence in the field of worker's compensation law is clear from ERISA itself which exempts from the coverage of ERISA an employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws. . . ." 29 U.S.C. § 1003(b)(4).[24]

That New Jersey had a strong interest in enacting the recent amendment to its Worker's Compensation Act cannot be denied. That Act "was intended to place the cost of accidental injuries which are work-connected upon employers, who may provide for them as operating expenses. *Renshaw* v. *United States Pipe & Foundry Co.,* 30 N.J. 458 (1959); *Tocci* v. *Tessler and Weiss, Inc.,* 28 N.J. 582 (1959)." *Daniello* v. *Machise Express Co.,* 119 N.J. Super 20, 24 (LawDiv. 1972), *aff'd,* 122 N.J. Super 144 (App. Div. 1973). Where a disability is compensable under that statute, a common law suit by the employee against his employer is unavailable. *Dudley* v. *Victory Lynn Lines, Inc.,* 32 N.J. 479 (1960). Consequently, if an employer can avoid his statutory duty to provide compensation to his

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[24] This court assumes that plaintiffs' pension plan is not such a plan. Nevertheless, 29 U.S.C. § 1003(b)(3) is relevant to determining Congressional intent with respect to the term "relate to" in 29 U.S.C. § 1144(a).

employees for work-related disabilities, the employee is without any remedy at all. If an employer can reduce an employee's retirement pension benefits by an amount equal to the employee's award of worker's compensation disability benefits, the employer has accomplished just that—he has avoided his statutory obligation to compensate the employee for his work-related disability. Thus, New Jersey had a strong interest in closing that "loophole" in its Worker's Compensation Act by enacting the recent amendment under consideration here.

In *Farmer* v. *Carpenters,* 430 U.S. 290, 302 (1977), the Supreme Court stated that:

> Our cases indicate, however, that inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

While it is true that the Court in that case was speaking of the National Labor Relations Act, as amended, which, unlike ERISA, does not contain specific preemptive language, the statement is nevertheless relevant in discerning Congressional intent with respect to the term "relate to" in ERISA, 29 U.S.C. § 1144(a).

The State of New Jersey's substantial interest in enacting the recent amendment to its Worker's Compensation Act has already been demonstrated. Moreover, this court cannot discern how that amendment threatens any interference with the federal regulatory scheme of ERISA, let alone undue interference. Finally, since the amendment simply does not relate to pension plans *qua* pension plans, but is instead directed towards protecting an em-

ployee's right to worker's compensation benefits, this court concludes that Congress did not intend to preempt the amendment by enacting ERISA and the preemptive language of 29 U.S.C. § 1144(a).[25]

CONCLUSION

I hold as follows:

1. Plaintiffs are entitled to the relief they seek because the offset provision of their pension plan is unlawful under ERISA, 29 U.S.C. § 1053.

2. Assuming *arguendo* that Congress did not outlaw the offset provision by enacting ERISA, Congress did not intend ERISA to prohibit the states from outlawing such offset provisions. Consequently, the plaintiffs are entitled to the relief they seek because the offset provision of the pension plan was rendered null and void by the "unless prohibited by law" clause of the pension plan when the State of New Jersey amended its Worker's Compensation Act on July 14, 1977 so as to prohibit offsets of retirement pension benefits against worker's compensaiton benefits.

FREDERICK B. LACEY
United States District Judge

Dated: August 24, 1978

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[25] Plaintiffs' contention that 29 U.S.C. § 1144(a) is inapplicable to the case at bar by reason of 29 U.S.C. § 1144(b)(1) is without merit. That provision provides as follows:

> (b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

Consequently, this court has found it necessary to consider the meaning of 29 U.S.C. § 1144(a) as applied to the facts of this case.

Opinion, dated December 20, 1978

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 77-1644

HENRY BUCZYNSKI, et al.,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendant.

LACEY, D.J.

The defendant moves for reconsideration of this court's decision embodied in an opinion and order filed August 24, 1978. That decision invalidated reductions by the defendant in the pension payments made to the plaintiffs in an amount equal to the value of payments received under the New Jersey Worker's Compensation Act, N.J.S.A. 34:15 *et seq.* Struck down was the pension plan's provision allowing this offset, Article IV, Section 2, on two separate grounds: first, that the offsets were unlawful under 29 U.S.C. § 1053; second, even if Congress did not forbid these pension deductions, New Jersey was not barred by the preemption doctrine from passing a law which effectively

outlawed this offset under the "unless prohibited by law" clause of the plan.

The defendant, in its motion to reconsider, challenges both rationales upon which the earlier decision was grounded.

29 U.S.C. § 1053

The defendant's action, I previously had held, violated the minimum vesting section of ERISA, 29 U.S.C. § 1053, by failing to make nonforfeitable the plaintiffs' rights to their retirement benefits. The defendant, arguing that the offsets do not constitute a forfeiture within the meaning of ERISA, relies on Treas. Reg. § 1.411(a)-4(a), which provides:

> Furthermore, nonforfeitable rights are not to be considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

Two courts have applied this regulation to hold that deducting worker's compensation payments from pension payments does not offend ERISA's nonforfeitability requirement. *Bordine* v. *Evans Products Co.*, 453 F.Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January 10, 1978).[1]

Plaintiffs have placed in issue the validity of the aforesaid regulation. Although Treasury Regulations are ac-

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[1] *Contra, Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447, 455 n.11 (E.D. Mich. 1978).

corded great respect and are not lightly overruled, *see Bingler* v. *Johnson,* 394 U.S. 741, 479-51 (1969), a Treasury Regulation that is inconsistent with Congressional enactments cannot stand. *United States* v. *Cartwright,* 411 U.S. 546, 557 (1973). A regulation will be struck down if it is inconsistent with the plain wording of a federal statute, *Busse* v. *Commissioner,* 479 F.2d 1147, 1152-53 (7th Cir. 1973), or if the regulation "conflict[s] with the philosophy and avowed purpose of legislation." *New York Shipbuilding Corp.* v. *United States,* 237 F.Supp. 995, 999 (D.N.J. 1965), *aff'd,* 362 F.2d 551 (3d Cir. 1966) (per curiam). Thus, the existence of a regulation does not end the inquiry.

First, the plaintiffs claim the Secretary of the Treasury is powerless to prescribe regulations affecting pension rights under 29 U.S.C. § 1053. This contention is without merit.

Thus, 29 U.S.C. § 1202(c) provides:

> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 . . . shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

Treas. Reg. § 1.411(a)-4(a) was issued to give guidance in interpreting 26 U.S.C. § 411; and 29 U.S.C. § 1053, entitled "minimum vesting standards," is located in part 2 of subtitle B of subchapter I. Accordingly, the Secretary of the Treasury had the authority to promulgate a binding regulation regarding § 1053.

Next to be considered is whether the aforesaid regulation is consistent with ERISA. The defendant's argument that it is requires careful analysis. First, the defendant points to 26 U.S.C. § 401, which states the requirements

for qualifying a pension plan. One requirement is that the plan be nondiscriminatory. A plan is not considered discriminatory "merely because the contributions or benefits . . . differ because of any retirement benefits created under State or Federal law." § 401(a)(5). In interpreting this statute, the Internal Revenue Service has ruled that a plan could provide that worker's compensation benefits could be offset against pension benefits without the plan being discriminatory. Rev.Rul. 68-243. Next, the defendant notes that Congress, in enacting ERISA, did not modify of 26 U.S.C. § 401(a)(5). Also, Congress explicitly stated that it "intend[ed] that the anti-discrimination rules of present law in areas other than the vesting schedule are not to be changed." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5058. Thus, defendant argues, because the pre-ERISA rules permitted deductions for worker's compensation benefits and this policy regarding nondiscrimination was continued by Congress, it therefore follows that Treas. Reg. § 1.411(a)-4(a) is consistent with ERISA generally and with § 1053 in particular.

This convoluted skein of reasoning is unconvincing. First, it is questionable that Congressional intent concerning 26 U.S.C. § 401 indicates anything at all about Congressional intent as to nonforfeitability under § 1053. *See Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 n.3 (2d Cir. 1977). The legislative history of ERISA underscores this. Under the heading of "permitted forfeitures of vested rights," Congress declared that "an employee's rights, once vested, are [with certain exceptions] not to be forfeitable for any reason. An employee's rights to benefits attributable to his own contributions may never be forfeited." H.R. Rep. No. 93-1280, 93rd Cong., 1st Sess., *reprinted in* [1974] U.S.

Code Cong. & Ad. News 5038, 5052. The report then lists a series of exceptions to the principle that an employee's vested rights are not forfeitable. None of these exceptions mention worker's compensation.

Another difficulty with the defendant's interpretation results from ERISA's handling of the term nonforfeitable. 29 U.S.C. § 1002(19) provides the definition.[2] Under this section only the exceptions specifically included in § 1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in § 1053 (a)(3) are exceptions to § 1002's definition of nonforfeitability. *See Riley* v. *MEBA Pension Trust, supra,* 570 F.2d at 409; *Utility Workers Union* v. *Consumer Powers Co., supra,* 453 F.Supp. at 456; *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005, 1008 (N.D. Ohio 1976).

Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. *See United States* v. *Bacto-Undisk,* 394 U.S. 784 (1969); *New York Shipbuilding Corp. supra.* Treas. Reg. §1.411(a)-

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[2] The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in § 1053(a)(3) of this title.

4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.[3]

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[3] The defendant makes two other arguments to sustain its position. Noting that the same phrase appears in both 26 U.S.C. § 401 (a)(5) and in 29 U.S.C. § 1082(c)(4)(A), the defendant takes this as evidence of the continued vitality of Rev.Rul. 68-243, which upheld offsets for Worker's Compensation as not being discriminatory for the purposes of 26 U.S.C. § 401(a)(4), suggesting that § 1053 also allows offsets. As was said in *Utility Workers Union, supra*: "The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language." 453 F.Supp. at 456.

The defendant also refers the court to 29 C.F.R. § 2605, stressing the language in the definitions in subsection 2:

> "Pension Benefit" means a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves . . . which payments by themselves or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient.

Under this regulation, the defendant argues, the Pension Benefit Guarantee Corporation (PBGC) has authorized reducing pension benefits if worker's compensation is provided. This regulation suffers from the same defects as does the Treasury Regulation, (Treas, Reg. § 1.411(a)-4(a), except that it is without a statutory basis and derives no support from the legislative history.

N.J.S.A. 34:15-29

The defendant also argues that the court erred in finding that the New Jersey law forbidding the offsets[4] (L. 1977, c.156 § 1, eff. July 14, 1977, amending N.J.S.A. 34:15-29) was not preempted by ERISA. The Third Circuit Court of Appeals recently enumerated the three grounds for preempting a state statute. In its motion for reconsideration, the defendant strongly contends that the New Jersey statute is invalid due to the second ground: "'the nature of the regulated subject matter permits no other conclusion' but pre-emption." *Rogers* v. *Larson*, 563 F.2d 617, 621 (3d Cir. 1977), *appeal filed*, 46 U.S.L.W. 3529 (U.S. Jan. 20, 1978) (citations omitted). Elaborating further, the court stated that this basis for preemption existed when "the subject matter of the federal and local laws . . . must inherently either conflict or be dupli-

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[4] The defendant again argues that preemption should be found under 29 U.S.C. § 1144(a) because the New Jersey law "relates to" pension plans. The defendant cites several cases in which preemption has been found. While those cases are useful in illuminating the Congressional intent underlying ERISA, the cases are not dispositive. "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question." City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973) (citations omitted). The same is also true with respect to the state regulation in question, for whether preemption by ERISA can be found will depend on the exact nature of the state laws. *Compare* National Carriers' Conference Comm. v. Heffernan, 454 F.Supp. 914 (D. Conn. 1978) *and* Standard Oil Co. of Cal. v. Agsauld, 442 F.Supp. 695, 707 (N.D. Cal. 1977) *with* Stone v. Stone, 450 F.Supp. 919, 931-33 (N.D. Cal. 1978) *and* Gast v. State, 47 U.S.L.W. 1067 (Oct. 31, 1978 Oregon). The court's conclusion that the New Jersey Worker's Compensation Law does not "relate to" pensions will be adhered to. *See also* Johnston v. Johnston, 47 U.S.L.W. 2331 (Oct. 27, 1978 California).

cative. That is, under this test it is impossible for there to be local regulation in the subject area that does not conflict with or duplicate federal regulation." *Id.*

For the purpose of analyzing preemption, this court, in its earlier opinion, assumed *arguendo* that ERISA did not forbid the offsets and that the New Jersey law was not on its face inconsistent with the federal enactment. If Congress had plainly declared that deductions for worker's compensation payments were allowed, or if the New Jersey law frustrated the Congressional purpose, then the Supremacy Clause would compel the striking down of New Jersey's law. *Ray* v. *Atlantic Richfield Co.*, 46 U.S.L.W. 4200, 4201 (1978). Thus, in treating the preemption question, it will continue to be assumed that Congress has not addressed the permissibility of offsets, either to allow them or to prohibit them.[5] Under this assumption, it is clear the New Jersey statute is not preempted, based upon the wording of the second ground of *Rogers* v. *Larson, supra.* It neither duplicates nor conflicts with ERISA.

This conclusion, aside from being compelled by *Rogers* v. *Larson, supra,* also follows from general principles of preemption. In a field historically falling within the sphere of state regulation, preemption will not be found unless a clear Congressional intent to preempt is found. *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). As determined in my earlier opinion, that clear expression

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[5] Consonant with the earlier opinion, the court still views the legislative history as being one consistent with the forbidding of offsets. To the extent that this history reveals Congressional intent to be unclear, in no way can the legislative history be said to support the contrary conclusion, that offsets were to be permitted.

of intent is absent. New Jersey's statute lies within the allowable range of police activity that gives rise to the presumption against preemption.

> States possess broad authority under their police power to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and *workmen's compensation laws* are only a few examples.

De Canas v. *Bica,* 424 U.S. 351, 356 (1976) (emphasis added)

After noting that the California statute challenged as being preempted belonged in the category of traditional state police powers, the Court found no preemption under the preemption test that "the nature of the . . . subject matter permits no other conclusion." *Id.,* quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963). *Rogers* v. *Larson, supra,* derives from this portion of *De Canas* its second ground for preemption; this shows that New Jersey's strong interest in worker's compensation will be a significant factor militating against finding preemption.

Another important rule in deciding preemption cases is that state and federal regulatory schemes should be harmonized, if possible. "[W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties." *Merrill Lynch Pierce Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127 (1973). The Court then went on to hold that California could apply its statute voiding restraints on competition,

despite the fact that the rule which the petitioner sought to enforce had been promulgated pursuant to federal statute. The Court observed that "California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme." *Id.* at 139-40.

Accordingly, given that the New Jersey statute neither duplicates nor conflicts with ERISA, that Worker's Compensation forms an area of strong public interest to New Jersey, see Memorandum Opinion at 9-10, and that the court is under a duty due to the nature of the federal system to try to validate proper exercises of the state police power, preemption does not exist. The offsets by the defendant are therefore barred by the "unless prohibited by law" clause.

CONCLUSION

Upon reconsideration, the previous decision of this court is followed.

FREDERICK B. LACEY
United States District Judge

Dated: December 20, 1978

Order, dated December 20, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL 77-1644

Defendant having moved for reconsideration of this court's decision of August 24, 1978, and reconsideration having been given;

IT IS HEREBY ORDERED this 20th day of December, 1978 that the previous decision of this court embodied in the opinion of August 24, 1978 is adhered to.

FREDERICK B. LACEY
United States District Judge

Letter Opinion, dated March 28, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
Frederick B. Lacey
Judge

United States Court House
Newark N. J. 07101

March 28, 1979

Lester Weiner Associates
325 Westfield Avenue, E.
Roselle Park, NJ 0724

Carpenter, Bennett & Morrissey, Esqs.
744 Broad Street
Newark, NJ 07102

Re: Buczynski v. General Motors Corporation
Civil No. 77-1644

Gentlemen:

Plaintiffs brought this suit challenging the defendant's policy of offsetting workers' compensation awards against pension payment. On August 24, 1978 this court issued an opinion granting the plaintiffs the relief they sought. This decision was adhered to in an opinion issued on December 20, 1978 on the defendant's motion for reconsideration. The parties are now before the court after having made various motions concerning the form of the order.

Plaintiffs move for attorneys' fees. 29 U.S.C. § 1132(g) provides that the court may, in its discretion, allow rea-

sonable attorneys' fees. This court, after having examined the affidavits submitted by plaintiff's counsel in support of this motion, finds them deficient under the standards set by the court of appeals of this circuit. Accordingly, the plaintiff's motion is denied without prejudice to renewal upon compliance with this circuit's standards.

Defendant moves for a stay of judgment pending appeal. Fed.R.Civ.P. 62(c) provides that a district court after a final judgment granting an injunction "in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." The parties agree as to the criteria to be used in determining whether a stay should be granted—they disagree as to the result in applying those criteria to the defendant's motion. Chief among the criteria is probability of success. The issues presented in this were novel and difficult. This court concludes that there is at least a reasonable probability that the defendant will prevail on appeal. Accordingly, the defendant's motion for a stay will be granted.

Very truly yours,

Frederick B. Lacey

FBL:abw

Order, dated March 28, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL No. 77-1644

The matter having come for trial before Honorable Frederick B. Lacey, U.S.D.J., upon the verified complaint and action for injunction of plaintiffs, Henry Buczynski and Alex Borusovic, and the class represented by them (Lester Weiner and Associates, Esqs., appearing for the plaintiffs, and Carpenter Bennett and Morrissey, Esqs., appearing for defendant), and the court having certified the action as a class action, and the court having considered the testimony, stipulations of fact, briefs, memoranda, and arguments of counsel, and the court having filed a memorandum opinion on August 24, 1978 and the court having given reconsideration to its decision upon defendant's motion for reconsideration, and the court having filed its opinion on December 20, 1978;

IT IS HEREBY ORDERED that the defendant, General Motors Corporation, is hereby permanently enjoined from making any deductions from retirement pensions payable to the plaintiffs and class members pursuant to Article IV, section 2 of the General Motors Corporation Hourly-Rate Employees Pension Plan; and

IT IS FURTHER ORDERED that defendant shall pay over to each plaintiff and class member the amount of money deducted from his or her basic pension benefits, which benefits have been made payable as a result of having reached normal retirement age, (together with interest from the date of deduction) within 30 days from the date of the Order; provided that in the event this court's judgment

that the deduction violates 29 U.S.C. § 1053 is reversed, that defendant shall pay over within 30 days from the date of the entry of this Order all sums deducted from any retirement benfits (together with interest from the date of deduction) on or after July 14, 1977; and

IT IS FURTHER ORDERED that the provisions of this order are stayed during the pendency of the appeal.

FREDERICK B. LACEY
United States District Judge

Dated: March 28, 1979

Order, dated April 4, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

This Court having filed an Order in the above-entitled cause on March 28, 1979, and good cause appearing,

IT IS on this 4 day of April, 1979,

ORDERED, that the Order filed by the Court herein on March 28, 1979, be and it hereby is withdrawn.

FREDERICK B. LACEY
United States District Judge

Amended Order, dated April 5, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 77-1644

The matter having come for trial before Honorable Frederick B. Lacey, U.S.D.J., upon the verified complaint and action for injunction of plaintiffs, Henry Buczynski and Alex Borusovic, and the class represented by them (Lester Weiner and Associates, Esqs., appearing for the plaintiffs, and Carpenter, Bennett & Morrissey, Esqs., appearing for defendant), and the court having certified the action as a class action, and the court having considered the testimony, stipulations of fact, briefs, memoranda, and arguments of counsel, and the court having filed a memorndum opinion on August 24, 1978 and the court having given reconsideration to its decision upon defendant's motion for reconsideration, and the court having filed its opinion on December 20, 1978;

IT IS HEREBY ORDERED that the defendant, General Motors Corporation, is hereby permanently enjoined from making any deductions from retirement pensions payable to the plaintiffs and class members, other than benefits payable by reason of disability, pursuant to Article IV, section 2 of the General Motors Corporation Hourly-Rate Employes Pension Plan; and

IT IS FURTHER ORDERED that defenant shall pay over to each plaintiff and class member the amount of money deducted from his or her basic pension benefits, which benefits have been made payable as a result of having reached normal retirement age (together with interest from the date of deduction) within 30 days from the date of

the Order; provided that in the event this court's judgment that the deduction violates 29 U.S.C. § 1053 is reversed, that defendant shall pay over within 30 days from the date of the entry of this Order all sums deducted from any retirement plan benefits, other than benefits payable by reason of disability (together with interest from the date of deduction), on or after July 14, 1977; and

IT IS FURTHER ORDERED that the provisions of this order are stayed during the pendency of the appeal.

FREDERICK B. LACEY
United States District Judge

Dated: April 3, 1979

Notice of Appeal, dated April 12, 1979

UNITED STATES DISTRICT COURT
DISTICT OF NEW JERSEY

Civil Action No. 77-1644

NOTICE IS HEREBY GIVEN that General Motors Corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Amended Order entered in this action on the 5th day of April, 1979.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
By: LAURENCE REICH
A Member of the Firm

Dated: April 12, 1979

Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1668

HENRY BUCZYNSKI, ALEX BORUSOVIC, and OTHER RETIREES SIMILARLY SITUATED,
Appellees

v.

THE GENERAL MOTORS CORPORATION,
Appellant

STATE OF NEW JERSEY,
Intervenor

(D.C. Civil No. 77-1644)

No. 79-1534

JOSEPH ALESSI, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKA, HELEN VOGT and T. EDWARD WHITE,
Appellees

v.

RAYBESTOS-MANHATTAN, INC., and RAYBESTOS-MANHATTAN, INC. EMPLOYEE RETIREMENT PLAN, jointly, severally or in the alternative,
Appellants

STATE OF NEW JERSEY,
Intervenor

Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

(D.C. Civil No. 78-0434)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued: January 8, 1980

Before: GIBBONS, ROSENN and GARTH, *Circuit Judges*

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Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

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Opinion of the United States Court of Appeals for the Third Circuit dated February 15, 1980

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OPINION OF THE COURT

(Filed February 15, 1980)

GARTH, *Circuit Judge*

These two appeals pose a single question: whether the Employee Retirement Income Security Act of 1974 (ERISA) or the laws of New Jersey invalidate the provision of the pension plans of defendants General Motors and Raybestos-Manhattan authorizing reduction, or offset, of pension benefits by amounts received by the pensioner under a Workmen's Compensation statute. We conclude that these offset provisions are not unlawful under ERISA, and that the New Jersey statute prohibiting them is preempted by ERISA. We therefore reverse the district court orders which enjoined such offsets and which required payment to pension beneficiaries of those amounts which the pension trustees had offset in the past.

I.

Both these cases present similar fact patterns,[1] and procedural histories. General Motors (GM) and

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1. No material facts are in dispute in either case. In *Alessi*, all facts were stipulated. In *Buczynski*, the parties filed a stipulation of facts and the plaintiffs presented, at the instance of the district

Raybestos-Manhattan (Raybestos) maintain pension plans covered by ERISA, 29 U.S.C. §1001 *et seq.* (1976). Both pension plans provide that, under certain circumstances, benefits will be reduced by the amount of Workmen's Compensation payments received by plan participants.[2]

NOTE 1 — *(Continued)*
court, the testimony of Hubert Clodfelter. Clodfelter was a union negotiator for the United Auto Workers in 1970 when the GM pension plan was under consideration. He testified about the meaning of the "unless prohibited by law" clause in the GM offset provision. *See* note 2 *infra*.

2. The GM offset clause provides:

Section 2. Deductions for Workmen's Compensation

In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

(a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.

(b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.

(c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

The Raybestos offset clause provides:

All Retirement Income payments shall be reduced by the entire amount of any and all payments the Member is eligible to receive under any and all statutes pertaining to workmen's compensation, occupational disease, unemployment compensation, cash sickness benefits, and similar laws, other than primary Social Security benefits, presently in effect or which may

In 1977, New Jersey enacted a statute expressly prohibiting such offset provisions. The statute, which became effective July 14, 1977, added the underscored sentence to N.J. Stat. Ann. §34:15-29 (Supp. 1979), a part of New Jersey's Workmen's Compensation program. The complete section now provides:

> The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. *The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.*

Shortly after this statute went into effect, the plaintiffs brought class actions[3] against the defendants in the

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be enacted from time to time, which payments are paid concurrently with the Retirement Income.

3. In *Alessi*, the request for class certification was abandoned after the case was removed to the federal courts, and the action was continued on behalf of the named plaintiffs only. In *Buczynski*, the following class was certified by consent of the parties:

> The certified class consists "of those persons who are retired members of the General Motors Corporation Hourly-Rate Employees Pension Plan who retired under the provisions of said Pension Plan as set forth in Exhibit A-1 to the Agreement between General Motors Corporation and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, dated November 11, 1970, November 19, 1973, or November 22, 1976, who retired with benefits payable for months commencing on or after April 1, 1971, and who, at the time of their retirement, were employed by General Motors Corporation in New Jersey." *See* order filed August 9, 1978.

Buczynski v. General Motors Corp., 456 F. Supp. 867, 868 n.1 (D.N.J. 1978).

New Jersey state courts. The named plaintiffs in each suit were former employees of the defendants who had recovered Workmen's Compensation judgments against the defendants and whose pension benefits were being reduced as a result.[4] The suits sought permanent injunctions against the offsets and recoupment damages for those offsets, alleged to be unlawful, which had already been made.

Both cases were removed by the defendants to the United States District Court for the District of New Jersey. Both district judges to whom the respective cases were assigned, reached the same result. The district court judge in *Buczynski* issued two published opinions. The first opinion is reported at 456 F. Supp. 867 (D.N.J. 1978). The second opinion, which denied reconsideration, is reported at 464 F. Supp. 133 (D.N.J. 1978). The district court judge in *Alessi* issued a single, unpublished letter opinion.

Although the complaints in both cases challenged the offsets only on the basis of the New Jersey statute, both courts found the offset invalid under §203(a) of ERISA, 29 U.S.C. §1053(a) (1976) (hereinafter §1053(a)). In so holding, both courts invalidated a regulation issued by the Treasury Department expressly authorizing the offset clauses, 26 C.F.R. §1.411(a)-4(a) (1979).[5] They also held that the New Jersey statute was

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4. One of the *Alessi* plaintiffs, Helen Vogt, had not yet begun to receive her plan benefits (which were deferred termination benefits rather than retirement payments) by the time suit was filed, and thus had not yet suffered the impact of the offset clause. She was scheduled to begin receiving termination benefits on February 1, 1979.

5. The *Buczynski* court's first opinion made no mention of the Treasury regulation. The regulation was only considered and found invalid in the opinion responding to GM's motion for reconsideration. *See* 464 F. Supp. at 134-36.

not superseded by ERISA's preemption clause, 29 U.S.C. §1144 (1976).[6]

General Motors and Raybestos bring these appeals, challenging the district courts' conclusions that the offsets are invalid under ERISA and that the New Jersey statute is not preempted. We address these issues in turn.[7]

II.

The plaintiffs claim that the defendants' offset is rendered unlawful by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). This section provides in pertinent part:

> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is

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6. The *Buczynski* court also held that it need not reach the preemption claim since it had already found that the offset was invalid under ERISA itself. *See* 456 F. Supp. at 872. Preemption was discussed, however, by assuming *arguendo* that the offset was *not* invalid under ERISA, *see id.* The court concluded that the New Jersey statute was not preempted, *id.* at 872-74.

After the *Buczynski* and *Alessi* opinions were issued, still another opinion of the district court of New Jersey addressing these questions was filed. Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). *Carpenter* diverged from *Buczynski* and *Alessi* by holding that ERISA did, indeed, preempt the New Jersey statute. *See* our discussion *infra* at Part III. The *Carpenter* court reached the same result as its predecessors, however, by holding that the Workmen's Compensation offset was prohibited by ERISA itself.

7. The State of New Jersey has intervened in both *Alessi* and *Buczynski*. In addition, several *amicus* briefs have been filed in *Buczynski*. The United States as *amicus* urges reversal of the district court. So do several steel companies, who are involved in litigation on this same issue in the Western District of Pennsylvania. These steel companies are: Crucible, Inc., Jones & Laughlin Steel Corp., Mesta Machine Co., Pullman-Standard, Shenango, Inc., United States Steel Corp., and Wheeling-Pittsburgh Steel Corp. The individual steelworkers, who are suing their employers on this issue, urge affirmance. The steelworkers are Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller, and George Zihol. The Gray Panthers, one of the *amici* permitted to file in *Buczynski*, urge affirmance as well.

nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

A Treasury regulation, however, addresses the permissibility of offsets under ERISA's antiforfeiture provision and expressly authorizes such offsets, declaring them *not* to be prohibited forfeitures. This regulation provides in pertinent part:[8]

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which

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8. This Treasury regulation was *not* issued under ERISA's antiforfeiture requirement found at 29 U.S.C. §1053(a) (1976), but rather under an antiforfeiture provision included in the Internal Revenue Code requirements for pension plans, 26 U.S.C. §411(a) (1976). The tax code requirement for pension plans was enacted in Title II of ERISA. ERISA expressly provides that Treasury Department regulations under the tax code pension provisions shall apply to the analogous provisions of ERISA codified in Title 29 of the United States Code. 29 U.S.C. §1202(c) (1976) provides:

> (c) Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter [which include 29 U.S.C. §1053(a)]. Except as otherwise expressly provided in this Act, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

We thus conclude that the Treasury regulation issued under the antiforfeiture requirement of 26 U.S.C. §411(a) (1976) must, if valid, control our interpretation of 29 U.S.C. §1053(a) (1976) as well. None of the parties here contends otherwise. This issue is discussed at greater length in Baker v. Otis Elevator Co., No. 79-1185, slip. op. at 5-8 (3d Cir., Nov. 13, 1979).

> are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

26 C.F.R. §1.411(a)-4(a) (1979).

In determining the legality of the Workmen's Compensation offset, then, we must begin our inquiry with this regulation, which, if held to be valid, would require us to sustain the offset provisions in the General Motors and Raybestos pension plans.

A.

In assessing the validity of 26 C.F.R. §1.411(a)-4(a) (1979), we first turn to a consideration of the character of the regulation. In this court's recent opinion in *Baker v. Otis Elevator Co.*, No. 79-1185 (3d Cir., Nov. 13, 1979), which also concerned the validity of a Treasury regulation interpreting a provision of ERISA, we recognized a distinction between two types of administrative regulations, with a corresponding distinction in the appropriate standard of review. We there stated:

> There can be no question but that the regulation with which we are here concerned is a legislative regulation which was issued pursuant to a clear delegation of rule making authority, *see* U.S.C. §1202(c) (1976). As Professor Davis has explained,
>
> > A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules.
> >
> > The distinction between the two kinds of rules is fundamental. . . . Valid legislative rules have about the same effect as valid statutes; they are binding on courts. . . .
> >
> > [By contrast, however,] [c]ourts always have power to substitute their judgment for ad-

> ministrative judgment as to the content of interpretative rules, but they refrain in varying degrees from substituting judgment in various circumstances . . . .
>
> 2 K.C. Davis, Administrative Law Treatise, §7:8 at 36-37 (1979). We recognize the distinction in the nature of the two types of rules, leading in turn to a distinction in our standard of review. Our scope of review of legislative rules is far more restricted than the scope of our review of interpretative rules. *See id.*, at 37.

Slip. op. at 9-10.

After an analysis of the Supreme Court's decision in *Batterton v. Francis*, 432 U.S. 416 (1977), which addressed the same issue, we concluded in *Baker* that, to sustain a legislative regulation, "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole," slip op. at 11-12.

As in *Baker*, the Treasury Department regulation at issue here is plainly legislative in nature; it was issued pursuant to the same delegation of rule-making power as the regulation in *Baker*, which was there held to be legislative. *See* slip op. at 9; 29 U.S.C. 1202(c) (1976). It is thus subject to the limited review prescribed in *Baker*.[9]

The plaintiffs contend that the Treasury regulation must be struck down because it is inconsistent with the

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9. Neither district court here recognized that 26 C.F.R. §1.411(a)-4(a) (1979) is a *legislative* regulation. Other courts that have invalidated this regulation have failed as well to recognize this salient characteristic. *See* note 10 *infra*. By failing to accord this regulaton the appropriate degree of deference, these courts have impermissibly substituted their own judgment as to the interpretation of the statute for that of the Treasury Department.

governing statutory provision, ERISA's antiforfeiture requirement, 29 U.S.C. §1053(a) (1976). Before turning to their claim, we think it is appropriate to acknowledge that fidelity to the standard of review set forth in *Baker* and *Batterton, supra*, requires that a legislative regulation be invalidated only for a clear and manifest conflict with the governing statute. Overturning a legislative regulation where the statute may arguably be given conflicting readings, or where the conflict between the regulation and the statute is not plain, does violence to the congressional intent to delegate rule-making authority to the administrative agency. Approached from this perspective, the conclusions reached by the district courts in *Buczynski* and *Alessi*, that the regulation is inconsistent with 29 U.S.C. §1053(a) (1976), cannot be sustained: The legislative history affirmatively supports the Treasury regulation, and, at the very least, any conflict between the regulation and the statute, if one indeed exists, is clearly insufficient to mandate invalidation.

B.

The district courts here, as well as the other courts that have invalidated this regulation,[10] make similar syllogistic arguments to demonstrate the conflict with ERISA which they perceive. They begin with §1053(a), which provides broadly that pension benefits must be

10. In addition to *Buczynski* and *Alessi*, offset provisions have been declared unlawful, and the Treasury regulation has been invalidated, in Strong v. Bucyrus-Erie, 472 F. Supp. 1089 (E.D. Wis. 1979); Utility Workers' Union v. Consumers Power Co., 453 F. Supp. 447 (E.D. Mich. 1978), *appeal docketed*, No. 78-1402 (6th Cir., August 2, 1978); and Carpenter Technology Corp. v. Boyton, No. 78-1415 (D.N.J., Dec. 12, 1979). Offset provisions, and the Treasury regulation authorizing them, have been *upheld* in Bordine v. Evans Products Co., 453 F. Supp. 19 (E.D. Mich. 1978); Pavlovic v. Chrysler Corp., No. 7-70438 (E.D. Mich., Jan. 10, 1978), and Carlson v. Bundy Corp., No. 6-72272 (E.D. Mich. 1977).

nonforfeitable. They then focus on §1053(a)(3), which specifically exempts certain pension plan provisions from the nonforfeitability rule. The list of these exceptions includes, *inter alia*, nonpayment of benefits if the plan participant dies, §1053(a)(3)(A), and suspension of benefits if the participant takes a job with an employer in the same industry, §1053(a)(3)(B). This list, however, does not include offsets for Workmen's Compensation. Finally, these district courts add to §1053(a) the definition of "nonforfeitable" found in 29 U.S.C. §1002(19) (1976), which provides:

> (19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions *shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.* (emphasis added).

Armed with these provisions, these district courts reason as follows: all reductions in benefits are forfeitures; all forfeitures are prohibited by §1053(a), with the sole exceptions being those listed in §1053(a)(3); Workmen's Compensation offsets are not included in the list of permissible forfeitures in §1053(a)(3); *ergo*, Workmen's Compensation offsets are prohibited forfeitures. Thus, they conclude that the Treasury regulation authorizing offsets for benefits provided under Federal or State law is in conflict with ERISA, and is therefore invalid, because it expands the class of permissible forfeitures beyond those specifically set forth in

§1053(a)(3). The *Buczynski* district court, in its second opinion, makes the argument as follows:

> Another difficulty with the defendant's interpretation results from ERISA's handling of the term "nonforfeitable". 29 U.S.C. §1002(19) provides the definition. Under this section, only the exceptions specifically included in §1053 are consistent with nonforfeitability. Worker's compensation does not appear. Only deductions included in §1053(a)(3) are exceptions to §1002's definition of nonforfeitability.
>
> Based on these cases, I must conclude it is clear that Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances. Regulations promulgated must assist in achieving this goal. Treas.Reg. §1.411(a)-4(a), by impeding the attainment of this goal, is inconsistent with the statute. Accordingly, the defendant's reliance on it as a source of expanding the scope of permissible deductions from pension payments is misplaced. Section 1053 forbids the offsets found in the defendant's plan.

464 F. Supp. at 135-36 (footnotes and citations omitted).

Thereafter, the district court in *Alessi*, relying on the *Buczynski* opinions, reached the same result. *See Alessi v. Raybestos-Manhattan*, No. 78-0434, slip op. at 5 (D.N.J., Feb. 15, 1979).

While this argument is not without some superficial appeal, the courts' syllogism is defective, and we must reject it. Understanding this defect, however, requires some explanation of the regulation of pension plans by the Internal Revenue Service before and after ERISA was enacted.

Prior to enactment of ERISA in 1974, the Internal Revenue Code set forth a variety of requirements that had to be met by pension plans in order to qualify for fa-

vorable tax treatment. One requirement was that the plans be nondiscriminatory. This tax code requirement was set forth in 26 U.S.C. §401(a)(4) & (5). On the passage of ERISA, these sections were amended, but the amendments did not alter the basic aim of the statute. Discrimination in contributions or benefits under a pension plan was still prohibited. These sections now provide in pertinent part:

> (a) Requirements for qualification. — A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * *
>
> (4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are—
>
> (A) officers,
>
> (B) shareholders, or
>
> (C) highly compensated.
>
> * * *
>
> (5) . . . [A] plan [shall not] be considered discriminatory . . . merely because the contributions or benefits of or on behalf of the employees under the plan . . . differ because of any retirement benefits created under State or Federal law. . . .

Under these sections, the IRS prior to ERISA had extensive experience with a pension plan provision similar to the offset clause challenged here. That provision was the offset of Social Security benefits against pension benefits. In its interpretation of the clause excerpted above from 26 U.S.C. §401(a)(5), the IRS had long permitted pension plans to offset pension benefits by the amount of Social Security benefits that a plan partici-

pant received. The first such regulation was issued in 1943, and it simply reiterated the statutory language quoted above. The current version of this regulation, issued in 1960, provides as follows:

> (b) A plan . . . under which the contributions or benefits differ because of any retirement benefit created under State or Federal law, will not be discriminatory because of such exclusion or difference, provided the total benefits resulting under the plan and under such law establish an integrated and correlated retirement system satisfying the tests of section 401(a).

26 C.F.R. §1.401-4(b) (1979).

The parties do not dispute that this regulation permits offset of pension benefits by the amount of Social Security benefits received.

In enacting ERISA, Congress was familiar with the practice of the IRS allowing such offset provisions. Congress was also aware that the IRS, while allowing such offsets, would not permit any *increase* in the rate of offset based upon any *increase* in the level of Social Security benefits occurring after a retiree began to receive his pension. Congress sought to codify this administrative practice of not permitting an increased offset based upon *increased* Social Security benefits, and did so by enacting §1021(e) of ERISA, which is codified at 26 U.S.C. §401(a)(l5) (1976). This section provides:

> (l5) a trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part . . . such benefits are not *decreased* by reason of *any increase* in the benefit levels payable under title II of the Social Security Act or *any increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first re-

ceipt of such benefits or the date of such separation, as the case may be. (emphasis added).

Congress's understanding in enacting this section is made clear in the report of the House Ways and Means Committee:

> Protection is given to retired individuals and individuals who are separated from the service of the employer against reductions in private plan benefits when social security benefit levels increase. In general, under present integration [*i.e.*, offset] procedures, social security benefits attributable to employer contributions are treated as though they were part of the private plan. As a result when the level of social security benefits increases, some integrated plans have reduced the amount of the retirement benefits that they provide for covered employees.
>
> Present law under administrative practice provides that qualified plans may not use increases in social security benefit levels to reduce the benefits that they pay where the employees concerned are retired and are already receiving integrated plan benefits. The bill codifies this treatment for retired persons. It also extends the prohibition against reducing plan benefits where social security benefit levels are increased to cases where the individuals concerned are separated from service prior to retirement and have deferred nonforfeitable rights to plan benefits. This provision is effective for increases in social security benefits which take place after the date of enactment or on the date of the first receipt of plan benefits or the date of separation from service (whichever is applica) if that date is later.
>
> These changes do not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized.

H.R. Rep. No. 93-807, 3 U.S. Code Cong. & Admin. News 4670, 4695-96 (1974).

Despite certain misgivings about offset, or integration practices expressed later in this report, Congress chose *not* to bar the Social Security offset entirely, but merely to prohibit *increases* in the amount of the offset based on *increases* in the amount of Social Security benefits.

A number of conclusions can be drawn from this history, conclusions which shed light on the analysis on which the *Alessi* and *Buczynski* courts relied in striking down the Treasury regulation. In choosing only to limit *increased* Social Security offsets rather than bar them entirely in §401(a)(15), Congress gave its implicit approval to the practice of permitting offsets against pension plan benefits — in that instance, an offset of Social Security benefits against pension plan benefits. Further, since §401(a)(15) was enacted at the same time as §1053(a)'s requirement that pension benefits be nonforfeitable, we must conclude that the offset of Social Security benefits implicitly approved in the former section was *not* simultaneously rendered illegal by the latter section's requirement of nonforfeitability.

This conclusion reveals the primary defect in the *Buczynski/Alessi* district court analyses. Those courts reasoned, as noted above, that all benefit reductions are forfeitures, and all forfeitures are impermissible except for the four exceptions listed in §1053(a)(3). Yet Congress has approved the Social Security offset, and that offset does not appear among the permissible forfeitures under §1053(a)(3). Thus, the district courts' reasoning runs afoul of Congress's approval of the Social Security offset. If all reductions in benefits are forfeitures, and all forfeitures are prohibited with the exceptions listed in §1053(a)(3), then, under the district courts' reasoning, Social Security offsets should also be prohibited. Yet, as we have seen, this is not the case. It is true, as the courts

reasoned, that all *forfeitures* are prohibited with the exception of those listed in §1053(a)(3), but it *cannot* be true that all reductions in benefits are necessarily forfeitures. Congress's implicit approval of the Social Security offset compels the conclusion that such an offset is *not* a forfeiture. Thus, the very basis on which the district courts found the Treasury regulation in issue here to conflict with §1053(a) is in error.

The plaintiffs contend, however, that the Workmen's Compensation offset cannot be sustained on the strength of Congress's approval of the Social Security offset. They contend that even if the Social Security offset is not a forfeiture under ERISA, the Workmen's Compensation offset *is*. Social Security benefits and pension benefits, they point out, are both designed to compensate for wages lost as a result of old age, and therefore the Social Security offset simply avoids a duplication of benefits directed to the same end. Workmen's Compensation, by contrast, is designed to compensate for losses flowing from employment related injuries; thus, the Workmen's Compensation offset, unlike the Social Security offset, cannot be defended as a means to avoid duplication of benefits.

The plaintiffs' argument here fails to recognize the breadth of the Social Security program. Social Security provides benefits for *disabilities, see* 42 U.S.C. §423 (1976), as well as benefits for old age. Thus, the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits. The Social Security offset, since it includes an offset of disability benefits, makes any purported distinction between the Social Security offset and the Workmen's Compensation offset meaningless. The disability offset, included within the Social Security offset, thus compels us to reject any purported distinction between Social Security offsets and Workmen's Compensation offsets.

And the same argument may be made with respect to benefits provided under the Railroad Retirement Act, 45 U.S.C. §231 *et seq.* (1976). The same implicit congressional approval of offsets of Social Security benefits that appears in 26 U.S.C. §401(a)(15) (1976) is accorded to offsets of Railroad Retirement Act benefits in 29 U.S.C. §1056(b) (1976).[11] Railroad retirement benefits include payments for disability as well as payments for old age. *See* 45 U.S.C. §231a(a)(1)(iv) & (v) (1976). Thus, Congress has implicitly approved two disability offsets against retirement payments. As a result, reliance on the difference in the character of the offsets (retirement benefits as opposed to disability benefits) is misplaced.

The conclusion that not all benefit reductions are forfeitures; that, specifically, a Social Security offset is not a forfeiture; and that the district courts' reasoning is erroneous, is enough by itself to require upholding the Treasury regulation under the review of legislative regulations prescribed by *Baker v. Otis Elevator* and *Batterton v. Francis*. Once we conclude that Social Security offsets are not forfeitures, in the absence of clear evidence that Congress intended to prohibit Workmen's Compensation offsets, it cannot be said that a regulation allowing Workmen's Compensation offsets is so contrary to ERISA that it cannot stand. Thus, we conclude that there is an insufficient basis on which to strike down the regulation.

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11. 29 U.S.C. §1056(b) provides in pertinent part:

> [A] plan may not *decrease* benefits of such a participant by reason of any increase in the benefit levels payable under title II of the *Social Security Act or the Railroad Retirement Act of 1937*, or any *increase* in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation. (emphasis added).

C.

Our conclusion that a proper interpretation of ERISA requires giving binding effect to this regulation receives further support in the legislative history of the Act. That history demonstrates to our satisfaction that Congress did not disapprove of Workmen's Compensation offsets as well as Social Security offsets.

In the course of IRS administration of the nondiscrimination requirement for pension plans under 26 U.S.C. §401(a)(4) & (5) (1976), the Service issued a revenue ruling explicitly approving an offset for Workmen's Compensation:

> Section 401(a)(5) of the Code provides that a plan shall not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan differ because of any retirement benefits created under State or Federal law.
>
> The effect of section 401(a)(5) of the Code is to permit total benefits inclusive of those provided under the social security or similar program, to be used for comparative purposes. *See* Part 4(j) of Revenue Ruling, 65-178, C.B. 1965-2, 94. A program, like the social security program, that requires employer contributions and makes benefits available to the general public is a similar program for purposes of Part 4(j) of Revenue Ruling 65-178.
>
> Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.

> Since the benefits payable under a *workmen's compensation law or occupational diseases law* are available to the general public, it is held that *benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan* in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer. (emphasis added).

Rev. Rul. 68-243, 1968-1 C.B. 157, 158.

The substance of this ruling has been republished by the IRS on two occasions.[12]

The legislative history of ERISA indicates that Congress was familiar with the IRS rules on integration of benefits in pension plans, and intended that these rules

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12. In 1969, the IRS published an extensive Revenue Ruling consolidating and updating the rules on qualification of pension plans under 26 U.S.C. §401 (1976). This ruling contained the same position expressed in Revenue Ruling 68-243:

> (4) *Integration With Benefits Provided Under Other Public Programs.* — Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. *Thus, benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan.* However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. *See* Rev. Rul. 68-243, C.B. 1968-1, 157. (emphasis added).

Rev. Rul. 69-421, part 4, (j)(4), 1969-2 C.B. 61, 72.

This same provision was included without change in a special IRS publication in 1972. Internal Revenue Service, Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972).

be preserved. The report of the Conference Committee states:

> Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

H. Conf. Rep. No. 93-1280, 3 U.S. Code Cong. & Admin. News 5038, 5058 (1974).

This history of IRS practice with respect to Workmen's Compensation offsets, and of congressional preservation of the antidiscrimination rules, suggests that, if anything, Congress approved of Workmen's Compensation offsets. Thus, the evidence indicates that the Treasury regulation in issue here conforms to congressional intent. Accordingly, because the regulation is not contrary to §1053(a) and the provisions of ERISA as a whole, we must sustain its validity.[13]

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13. An additional argument in support of the position taken by GM and Raybestos was made by the *amicus* steel companies. They called our attention to a proposal made in Congress by Senators Harrison Williams and Jacob Javits, two of the original sponsors of ERISA. The proposal, if enacted into law, which it was not, would have prohibited Workmen's Compensation offsets. The proposal states:

> (a) Section 206(b) of such Act [ERISA] is amended
>
> . . . .
>
> (3) by adding at the end thereof the following new sentence: "A pension plan may not reduce or suspend retirement pension benefits being received by a participant or beneficiary or retirement pension benefits in which a participant who is separated from the service has a nonforfeitable right by reason of any payment made to the participant or beneficiary by the

III.

Our conclusion that the Treasury regulation must be sustained does not, by itself, require granting judgment in favor of the defendants. For even if ERISA does not prohibit the Workmen's Compensation offset in the GM and Raybestos pension plans, New Jersey's 1977 statute *does*. This statute, as noted earlier, provides in relevant part:

> The right of compensation granted by this chapter [the workmen's compensation act] may be set off

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employer maintaining the plan as the result of an award or settlement made under or pursuant to a workers' compensation laws."

As we understand the argument, the steel companies contend that there would have been no need for the introduction of such a proposal unless ERISA as originally enacted, and as currently in force, permitted Workmen's Compensation offsets.

While certainly plausible, we do not attribute much weight to this argument. The difficulty with it, as with all arguments of this nature, is that the understanding of the amendment's sponsors is open to conflicting interpretations. It is possible that the sponsors believed that such offsets were permissible under the original ERISA. It is also possible, however, that they believed that such offsets were *impermissible* under ERISA as enacted, and sought the amendment to override the Treasury regulation that erroneously, in their view, authorized such offsets. Thus, the argument cuts both ways.

Two additional arguments, attacking our conclusion that the regulation is valid, are made by *amici* Gray Panthers and Steelworkers. Neither of these arguments merits discussion. They argue that the regulation conflicts with 29 U.S.C. §1056(d)(1) (1976), which provides that pension plan benefits "may not be assigned or alienated," and with 29 U.S.C. §1103(c)(1) (1976), which provides that "the assets of a plan shall never inure to the benefit of any employer, and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." In our opinion, the discussion and analysis found in part II, *supra*, which demonstrates an overriding congressional intent to permit Workmen's Compensation offsets against pension benefits, disposes of these contentions as well.

against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

N.J. Stat. Ann. §34:15-29 (Supp. 1979).

The statute, of course, prohibits the offset clause challenged here, and the defendants do not contend otherwise. They do claim, however, that this statute is superseded by ERISA's preemption provision, 29 U.S.C. §1144(a) (1976).[14] This section states:

(a) Except as provided in subsection (b) of this section,[15] the provisions of this subchapter and subchapter III of this chapter shall supersede any

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14. The State of New Jersey, which has intervened in both *Buczynski* and *Alessi*, asks us to abstain from deciding the preemption question. It suggests that if we await a New Jersey state court interpretation of the statute, it may obviate our consideration of the preemption claim. The state suggests that the New Jersey courts are likely to hold that N.J. Stat. Ann. §34:15-29 (Supp. 1979) protects employees who obtained Workmen's Compensation judgments after the statute went into effect. Since all the plaintiffs in *Alessi* and all the named plaintiffs in *Buczynski* recovered their judgments before the effective date of the statute, it does not, New Jersey argues, protect them and there is no need to determine whether the statute is preempted by ERISA.

However, we decline to abstain for two reasons. First, the construction of the statute that New Jersey proposes will not forever remove the need for consideration of the preemption question. It will simply postpone consideration until a claim is made by an employee who recovered a Workmen's Compensation award after July 14, 1977 and it appears to us that such a claim is not far off. Second, and of greater importance, the certified class in *Buczynski* appears to include persons who recovered Workmen's Compensation judgments after the statute's effective date. *See* note 3 *supra*. Thus, there are plaintiffs in this suit who are protected by the statute regardless of how the New Jersey courts may construe the statute. In this posture, then, we are obliged to resolve the preemption claim.

15 None of the exceptions referred to are applicable here, and the plaintiffs do not argue to the contrary.

and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The district court judge in *Buczynski*, despite his conclusion that the offset provision was unlawful under ERISA itself, nevertheless discussed the preemption issue. The district court in *Buczynski*, followed thereafter by *Alessi*, concluded that the New Jersey statute was not preempted:

> It is true that under ERISA, 29 U.S.C. §1144(a), all state laws which "relate to" any employee benefit plan covered by ERISA are superseded. Although the New Jersey statute undoubtedly "relates to" pension plans in the broadest dictionary sense of that term, this court cannot agree with the defendant that the New Jersey statute "relates to" pension plans within the meaning of ERISA, 29 U.S.C. §1144(a). Congress, to be sure, must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation. However, the New Jersey statute at issue here is in no way concerned with pension plans *qua* pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to worker's compensation disability benefits. . . .
>
> Congress, by enacting ERISA, and the specific preemptive language of 29 U.S.C. §1144(a), could not have intended to prohibit states from protecting an employee's state-created right to worker's compensation benefits by enacting laws such as the one New Jersey enacted here.

456 F. Supp. at 872-73 (citations omitted).

Our reading of ERISA satisfies us that ERISA *does* preempt N.J. Stat. Ann. §34:15-29 (Supp. 1979). Thus, we cannot agree with the district courts that have concluded otherwise.[16] The primary purpose of the statute, and its direct effect, is to prohibit pension plans from offsetting Workmen's Compensation benefits against pension retirement benefits. It simply cannot be said that this statute does not concern pension plans *qua* pension plans (*Buczynski*), or that its effect on such plans is merely collateral (*Alessi*). In our opinion, the *only* purpose and effect of the statute is to set forth an additional statutory requirement for pension plans; this purpose negates the characterization of the statute attributed to it by the New Jersey district courts.

Further, ERISA preempts state statutes that "*relate to* any employee benefit plan," 29 U.S.C. §1144(a) (1976) (emphasis added). The view taken by the *Buczynski* court, that ERISA preempts only statutes concerning "pension plans *qua* pension plans," could be accepted only if ERISA's preemption clause were much more narrowly drawn than it is. Here, the preemption clause, reaching statutes that "relate to" pension plans, has an obviously broader scope

In noting that "the New Jersey statute undoubtedly 'relates to' pension plans in the broadest dictionary sense of that term," 456 F. Supp. at 872, the district court in *Buczynski* appears to concede the difficulty of its narrow interpretation. The court reasoned, however, that Congress could not have intended the term to be given its full breadth. Yet the legislative history of the clause, as well as the plain meaning of its language, belie this claim. The legislative history of the clause has been de-

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16. As previously noted, *see* note 6 *supra*, still another New Jersey district court has addressed this preemption question, and agrees with our conclusion that the New Jersey statute is preempted by ERISA. *See* Carpenter Technology Corp. v. Boyton, No. 78-1415, slip op. at 5-9 (D.N.J., Dec. 12, 1979).

tailed elsewhere and we need not repeat it here. *See Wadsworth v. Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *National Carriers' Conference Comm. v. Heffernan*, 454 F. Supp. 914, 915-17 (D. Conn. 1978); *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). We need only note its most prominent features: that the original House and Senate provisions were significantly narrower, and were rejected by the Conference Committee in favor of the current provision; and that explanations of the Conference substitute given on the floor of both chambers make plain that the preemptive intent is just as broad as its language suggests. Thus, it is clear that the preemption provision is intended to be read in its normal dictionary sense, and that the New Jersey statute prohibiting Workmen's Compensation offsets cannot stand.[17]

IV.

We conclude that the Workmen's Compensation offset in General Motors's and Raybestos's pension plans is not a forfeiture rendered invalid by ERISA's antiforfeiture provision, 29 U.S.C. §1053(a) (1976). In so concluding, we sustain the Treasury regulation expressly authorizing provisions of this type, 26 C.F.R. §1.411(a)-4(a) (1979). We also conclude that the New Jersey statute that prohibits these offsets, N.J. Stat. Ann. §34:15-29 (Supp. 1979), is preempted by ERISA, 29 U.S.C. §1144(a) (1976).

---

17. Raybestos, in the district court in Alessi, contended that the New Jersey statute should be struck down on at least two other grounds. First, that the statute was preempted under the National Labor Relations Act, and, second, that it was an unconstitutional impairment of the obligation of contracts. The court rejected both of these attacks, slip op. at 8-9. In light of our conclusion that the statute is preempted by ERISA itself, we need not reach these issues.

In light of our conclusions, which are contrary to the conclusions reached by the district courts in both *Buczynski* and *Alessi*, we will vacate the respective orders dated April 3, 1979 (*Buczynski*) and March 1, 1979 (*Alessi*) which permanently enjoin the defendants from offsetting Workmen's Compensation benefits and which required that reimbursement be made for amounts offset in the past; we direct that the district courts enter judgment for the defendants. Each side shall bear its own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Judgment, dated February 15, 1980

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1534

ALESSI, JOSEPH, RAYMOND BUISSON, STEPHEN MICHALSKI, CHARLES REPKS, HELEN VOGT AND T. EDWARD WHITE

vs.

RAYBESTOS-MANHATTAN, INC. AND RAYBESTOS-MANHATTAN, INC., EMPLOYEE RETIREMENT PLAN JOINTLY, SEVERALLY AND IN THE ALTERNATIVE,

Appellants,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 78-0434)

No. 79-1668

BUCZYNSKI, HENRY, ALEX BORUSOVIC AND OTHER RETIREES SIMILARLY SITUATED

vs.

Judgment, dated February 15, 1980

THE GENERAL MOTORS CORPORATION,

Appellant,

STATE OF NEW JERSEY,

Intervenor.

(D. C. Civil No. 77-1644)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, ROSEN and GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on January 8, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court dated April 3, 1979 and appealed at our No. 79-1668, and dated March 1, 1979, and appealed at our No. 79-1534, be, and the same are hereby vacated and the causes are remanded to the said District Courts for entry of judgments for the defendants, all in accordance with the opinion of this Court. Each side shall bear its own costs.

Certified Judgment in Lieu of Mandate dated March 27, 1980

Attest:

THOMAS F. QUINN
Clerk

Certified as a true copy and issued in lieu of a formal mandate on March 27, 1980.

February 15, 1980

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

Order Granting Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. 80-193

HENRY BUCZYNSKI, et al.,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION, et al.

ORDER ALLOWING CERTIORARI. Filed November 3, 1980.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

The case is consolidated with No. 79-1943 and a total of one hour is allotted for oral argument.

No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX TO BRIEF OF RESPONDENT

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APPENDIX A

Opinion of the U. S. Court of Appeals for the Ninth Circuit in *Standard Oil Company of California* v. *Agsalud*, 317 BNA Pens. Rep. D-1 (9th Cir. Oct. 15, 1980)

STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiff-Appellee,

No. 78-1095

October 15, 1980

v.

JOSHUA C. AGSALUD, *et al.*,

Defendants-Appellants.

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Text:

The questions in this appeal concern whether Hawaii's comprehensive Prepaid Health Care Act, Haw. Rev. Stat. ch. 393, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1381 (ERISA). Appellants are officials of the State of Hawaii charged with the responsibility of enforcement of the Hawaii Act under state law. They challenge on statutory and constitutional grounds the district court's decision that ERISA preempts the Hawaii Act. The district court's exhaustive opinion by Judge Renfrew is reported at 442 F.Supp. 695 (N.D.Cal. 1977). We are in basic agreement with that decision and affirm.

ERISA regulates the administration of private employee benefits and pension plans and establishes standards relating to the administration of these plans, particularly with respect to disclosure, reporting, vesting of benefits, funding and the conduct of plan managers. The Hawaii Prepaid Health Care Act requires employers in that state to

provide their employees with a comprehensive prepaid health care plan. The Act was initially adopted in 1974, shortly after ERISA was enacted, and apparently no other state has adopted similar legislation.

The appellee, Standard Oil Company of California, a substantial employer in Hawaii, provides its employees with a self-funded health care plan, governed by ERISA, which does not comply in all respects with the Hawaii Act. When appellants attempted to enforce the Hawaii Act against it, Standard Oil filed this action seeking declaratory and injunctive relief.

Section 3 of ERISA, 29 U.S.C. § 1002, defines "employee welfare benefit plan" broadly as any plan or program maintained by an employer or employee organization to provide medical, surgical or hospital care or benefits. ERISA § 514 (a), 29 U.S.C. § 1144(a), provides that ERISA supersedes or preempts all state laws which "relate to any employee benefit plan."[1] The district court held that ERISA preempts the Hawaii law, that the Hawaii law does not fit into any exemptions from ERISA coverage, and that preemption is constitutional.

The appellants (Hawaii) argue that the benefit plans which the Hawaii Act is designed to require are not employee benefit plans within the meaning of §3 of ERISA. This Court has already held that ERISA preempts state regulation of medical, surgical and hospital benefits and has rejected the contention that regulation of such benefits is a "law which regulates insurance" within the meaning of §514(b)(2)(A) of ERISA, 29 U.S.C. §1144(b)(2)(A).

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[1] ERISA § 3, 29 U.S.C. § 1002, defines "employee benefit plan" in pertinent part as an "employee welfare benefit plan."

Hewlett-Packard Co. v. *Barnes,* 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831, 99 S.Ct. 108, 58 L. Ed. 2d 125 (1978), aff'g, 425 F.Supp. 1294, 1300 (N.D. Cal. 1977). See also *St. Paul Electrical Workers Welfare Fund* v. *Markman,* 490 F.Supp. 931 (D.Minn. 1980) (Minnesota's Comprehensive Health Insurance Act preempted by ERISA). Hawaii nevertheless argues that because its statute requires employers to provide benefits, the benefit plans are outside the scope of ERISA's coverage.

At the time ERISA was enacted, all private plans were voluntary as opposed to mandated by state law and ERISA itself does not require employers to provide plans. We cannot agree, however, with Hawaii's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage. Congress did distinguish between plans established or maintained by private employers for private employees and plans established or maintained by government entities for goverment employees. Such government plans are exempt. ERISA §§3(1), 3(32), 4(b)(1), 29 U.S.C. §§1002(1), 1002(32), 1003(b)(1). See *Feinstein* v. *Lewis,* 477 F.Supp. 1256 (S.D.N.Y. 1979). Private plans are not. The plans which Hawaii would require of private employers are not government plans. There is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees. The legislative history convincingly demonstates a broad congressional preemptive intent. See the discussion in the district court opinion in *Hewlett-Packard, supra,* at 1298-1300. See also *Wadsworth* v. *Whaland,* 562 F. 2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980, 981, 98 S.Ct. 1630, 56 L.Ed.2d 72 (1978); *Delta Air Lines, Inc.* v. *Kramarsky,* 485 F.Supp. 300 (S.D.N.Y. 1980). The plans envisioned under the Hawaii statute are therefore not rendered

outside the definition of employee welfare benefit plans simply because Hawaii has attempted to make them mandatory.

Hawaii next argues that, even if plans which its Act would require are within the ERISA definition of employee benefit plans, they are nevertheless exempted under ERISA §4(b)(3), 29 U.S.C. §1003(b)(3), which provides that ERISA shall not apply to any plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." Specifically, appellants argue that the Hawaii Act is a "disability insurance law" within the meaning of section.

Judge Renfrew's opinion below discusses this question at length, and we agree with his conclusion that the Hawaii Act is not a disability insurance law. Disability insurance compensates people who, because of disability, are unable to perform their normal employment duties. *See Standard Oil Co.* v. *Agsalud*, 442 F.Supp. 695, 698 (N.D.Cal. 1977). Hawaii's law, on the other hand, is concerned with benefits regardless of any relationship to a disabling condition. Hawaii points out that examples of disability insurance laws were specifically referenced in the legislative history of the Welfare and Pension Plans Disclosure Act of 1958, the predecessor to ERISA. These examples included laws which provided not merely replacement of wages lost by virtue of a disability, but which also provided medical benefits for treatment of the disability. S.Rep.No. 1734, 84th Cong., 2d Sess. 16 (1956) (citing the Federal Railroad Unemployment Insurance Act, 45 U.S.C. §§351-67, general maritime law, and the disability insurance laws of New Jersey, Rhode Island, New York and California). It does

not follow, however, that all insurance or benefit plans covering medical expenses, regardless of their relationship to a disability, are "disability insurance" within the meaning of ERISA.

Appellants next contend that even if the Hawaii Act is not a "disability insurance law" within the meaning of ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3), that section was intended to exempt from ERISA coverage all governmentally required insurance programs, and not merely those specifically enumerated. There is no support for that position in the language of the statute which references only unemployment, workmen's compensation and disability insurance laws. It is true that those were the only types of compulsory state insurance legislation in effect at the time of the passage of ERISA. Thus the broad preemption of all other compulsory plans prevents state experimentation with other types of programs. The question, however, is one of policy for Congress and not of statutory interpretation for this Court.[2]

We must similarly reject Hawaii's claim that by referencing only certain types of social insurance the statute is arbitrary and violates the due process clause of the fifth amendment. Congress doubtless could have chosen to exempt all state social insurance and health insurance laws in order to encourage experimentation. Instead it

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[2] Senators Javits and Williams have introduced a bill amending ERISA which would, among other things, specifically provide that the Hawaii Act is not preempted. S. 209, § 155, 96th Cong. 1st Sess. (1979), reprinted in 125 Cong. Rec. S. 564-65 (daily ed. Jan. 24, 1979). See also 125 Cong. Rec. S 575 (1979) (remarks of Sen. Javits, explaining the preemption section of the bill).

chose to exempt only those types of programs with which the states had some experience and with which employers were accustomed to dealing. We cannot say that its choice in this regard, however, was without rational basis, and that is the standard which we must employ. *Richardson* v. *Belcher,* 404 U.S. 78, 92 S. Ct. 254, 30 L.Ed.2d 2131 (1971); *Bolling* v. *Sharpe,* 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed. 884 (1953).

Hawaii also urges that there is an inconsistency, which it argues reaches constitutional dimension, in holding that the Hawaii Act is preempted by ERISA when another scheme, the Rhode Island Catastrophic Health Insurance Plan, R.I. Gen.Laws §§ 42-62-1 to 42-62-22, is not preempted. The appellee does not concede that the Rhode Island law is exempt, and in any event, accurately points out that the Rhode Island statute differs from the Hawaii statute in that the Rhode Island statute is not based on the employer-employee relationship common to ERISA and the Hawaii Act. The Rhode Island statute envisions a state administered fund rather than funds established or maintained by employers. The Hawaii Plan and the Rhode Island Plan are distinguishable insofar as they may be affected by ERISA.

Hawaii's argument concerning the tenth amendment, and its position that states and not Congress are empowered to regulate private health insurance plans, are adequately dealt with by this Court's decision in *Hewlett-Packard, supra,* which rejected similar arguments. As a corollary to the tenth amendment argument in this case, however, Hawaii suggests that its Act is an exercise of the state's taxing power because it requires employers to pay half the health insurance premiums of their employees. We agree with the district court's opinion be-

low that the taxing power is the power to require money to be "paid to the State as a State," and that power is not invoked here. *Illinois Central R. Co.* v. *Decatur,* 147 U.S. 190, 13 S.Ct. 293, 37 L.Ed. 132 (1893). See also *National Carriers' Conf. Comm.* v. *Heffernan,* 454 F.Supp. 914 (D.Conn. 1978).

Finally, Hawaii argues that the preemption language of §514(a) of ERISA, 29 U.S.C. §1144(a), is not broad enough to encompass the Hawaii Act. That section of ERISA provides generally that the Act shall supersede "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" not otherwise exempted in the Act. Appellants in the district court argued that since ERISA was concerned primarily with the administration of benefit plans, its provisions were not intended to prevent the operation of laws like the Hawaii Act pertaining principally to benefits rather than administration. There is, however, nothing in the statute to support such a distinction between the state laws relating to benefits as opposed to administration. As the district court pointed out, the language of the statute provides that ERISA shall supersede "any and all State laws" and that does not mean "some but not all the State laws." 442 F.Supp. at 707.

Hawaii now seeks support from Judge Renfrew's later decision in *Stone* v. *Stone,* 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd.* slip op. p. 180, —— F.2d —— No. 78-2313 (9th Cir. Sept. 29, 1980), holding that application of California's community property laws to division of a pension was not preempted by ERISA. Accord: *United Ass'n of Journeymen* v. *Myers,* 488 F.Supp. 704 (M.D. La. 1980); *Carpenters Pension Trust* v. *Kronschnabel,* 460 F.Supp. 978 (C.D.Cal. 1978), aff'd, slip. op. p. 186, ——

F.2d ——, No. 78-2313 (9th Cir. Sept. 29, 1980).[3] Judge Renfrew's opinion in *Stone* distinguished that case from this one, noting first that this court in *Hewlett-Packard, supra,* took a broad view of the preemption of federal law over state law in the health insurance field, and noting further that domestic relations laws only tangentially affect employee benefit plans.

The Hawaii Act before us differs from community property laws. The Act directly and expressly regulates employers and the type of benefits they provide employees. It must "relate to" employee benefit plans within the meaning of ERISA's broad preemption provision, ERISA §514(a), 29 U.S.C. §1144(a).

Affirmed.

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[3] The contrary view, i.e., that ERISA does preempt state community property law, had been taken by another district court in the Circuit in *Francis* v. *United Technologies Corp.,* 458 F.Supp. 84 (N.D. Cal. 1978). See also Note, ERISA Preemption of Community Property Law, 55 Wash.L.Rev. 443 (1980); Note, Preemption of California Community Property Law by ERISA: Congressional Intent and Judicial Interpretation, 10 Pac.L.J. 881 (1979); Reppy Community and Separate Interests in Pensions and Social Security Benefits After *Marriage of Brown* and ERISA, 25 U.C.L.A. L.Rev. 417 (1978): Comment, The Employee Retirement Income Security Act of 1974—The Spouse's Interest or Non-Interest in a Community Property Asset, 12 Cal. West.L.Rev. 560 (1976). A similar split in authority has developed with respect to application of state garnishment laws to benefit plans. See generally *General Motors Corp.* v. *Buha,* 623 F.2d 455 (6th Cir. 1980) (listing cases).

APPENDIX B

Memorandum Opinion of the United States District Court for the Eastern District of Michigan in *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation*, No. 79-73728 (E.D. Mich. Dec. 11, 1980)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL No. 79 73728

PETE DOTSON,

Plaintiff,

v.

SAGINAW PARTS, CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION and GENERAL MOTORS HOURLY RATE EMPLOYEES PENSION PLAN,

Defendants.

The plaintiff, a retiree of Chevrolet Motor Division, General Motors Corporation (GM), filed this action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, to recover pension benefits allegedly withheld wrongfully under the General Motors Hourly Rate Employees Pension Plan (the Plan). The Plan is a qualified plan under the applicable provisions of the Internal Revenue Code, 26 U.S.C.

§§ 1 *et seq.*, and it is subject to the applicable provisions of ERISA. The court has jurisdiction over this cause pursuant to 29 U.S.C. § 1132(a) (1976). The parties filed cross motions for summary judgment, which we now have under consideration. Basically, the parties are not in disagreement over the relevant facts surrounding this dispute. Instead, they disagree as to the conclusions that should be drawn from the application of certain provisions of ERISA to those facts.

Plaintiff began employment with General Motors Corporation at the Chevrolet Motor Division Parts Plant in Saginaw, Michigan on October 10, 1951. Plaintiff retired on June 30, 1972 under the total and permanent disability provisions of the Plan and he began receiving monthly pension benefits on July 1, 1972.[1] More than two years after plaintiff retired from General Motors Corporation, he filed a claim with the Bureau of Workmen's Compensation for the State of Michigan. In a decision dated April 27, 1976, plaintiff was awarded weekly workmen's compensation benefits in the amount of $90 per week, commencing October 26, 1971, the onset date of his disability. The Workmen's Compensation Appeal Board affirmed the decision of the administrative law judge granting plaintiff workmen's compensation benefits. Defendant has paid $2,705.85 in workmen's compensation benefits to plaintiff for the period April 27, 1976 through May 26, 1977 and has continued to pay weekly benefits in the amount of

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[1] Plaintiff went on sick leave beginning October 25, 1971, and he received sickness and accident benefits under the General Motor's group insurance plan. Plaintiff applied for retirement from General Motors under the total and permanent disability provision of the Plan on May 22, 1972.

$53.55. Pursuant to the collective bargaining agreement between GM and the United Automobile Workers, defendant deducted the amount of plaintiff's workmen's compensation benefits from his monthly benefits under the Plan. Article IV, § 2 of the "Supplemental Agreement Covering Pension Plan" provides in pertinent part:

> In determining the monthly benefits payable under this Plan to an employee who retires with benefits payable for months commencing on or after April 1, 1971, *a deduction shall be made unless prohibited by law*, equivalent to all or any part of Workmen's Compensation . . . payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation. . . . Defendants' Ex. A. (Emphasis added.)

Plaintiff alleges in his complaint that the provision in the Plan allowing workmen's compensation benefits to be offset against benefits payable under the Plan violates Section 203(a) of ERISA, 29 U.S.C. § 1053(a), which provides that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . ." Plaintiff further alleges that the workmen's compensation offset violates Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1), which provides that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and

defraying reasonable expenses of administering the plan."[2] Plaintiff seeks a declaration that Article IV § 2 of the Plan violates ERISA, injunctive relief restraining further implementation of the provision authorizing the workmen's compensation offset and recovery of the pension benefits improperly withheld.

In the first instance, we do not find that the offset of workmen's compensation benefits under the Plan violates the antiforfeiture provision of ERISA, 29 U.S.C. § 1053(a). We agree with the court in *Buczynski* v. *General Motors Corp.*, 616 F.2d 1238 (3d Cir. 1980), that the workmen's compensation offset is expressly authorized by a treasury regulation, 26 C.F.R. § 1.411(a)-4(a) (1979), which is a valid legislative regulation issued pursuant to a clear delegation of rule-making authority, *see* 29 U.S.C. § 1202(c), and which is consistent with the purposes of ERISA and its legislative history. *Accord Pavlovic* v. *Chrysler Corp.*, No. 7-70438, Kennedy, J. (E.D. Mich., filed January 10, 1978).[3] Treasury Regulation 1.411(a)-4(a) provides in pertinent part:

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[2] Plaintiff also alleges in his complaint that Article IV § 2 of the Plan violates 29 U.S.C. § 1056(d)(1) (1976), which provides that pension plan benefits "may not be assigned or alienated." Plaintiff appears to have abandoned this contention, since he did not address this issue in his motion for summary judgment or at the hearing on the cross motions for summary judgment. In any event, we find it to be without merit.

[3] We recognize that the court in *Utility Workers Union* v. *Consumers Power Co.*, 453 F. Supp. 447 (E.D. Mich. 1978), held that the workmen's compensation offset provisions of the Plan constituted a forfeiture in violation of 29 U.S.C. § 1053(a). The

(Footnote continued on following page)

Appendix B

> [N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits. 26 C.F.R. § 1.411(a)-(4)a (1979).

Title I of ERISA contains provisions for the protection of employee benefit rights. Title II contains amendments to the Internal Revenue Code concerning taxation of pension plans, which is codified in Title 26 of the United States Code. The tax provisions in Title II parallel the employee benefit provisions in Title I. Although Treasury Regulation 1.411(a)-4(a) was promulgated by the Secretary of Treasury under Section 411(a) of the Internal Revenue Code, 26 U.S.C. § 411(a), which relates to minimum vesting standards, Section 3002(c) of ERISA, 29 U.S.C. § 1202(c), expressly provides that Treasury Department regulations under the Internal Revenue Code pension provisions shall apply to the analogous employee benefit provisions in Title I of ERISA. Congress delegated to the Treasury Department the authority to issue regulations concerning participation, vesting and funding

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(Footnote continued from preceding page)

district court in *Utility Workers Union* declined to give any deference to Treasury Regulation 1.411(a)-4(a), finding that the Secretary of Treasury had not been given authority to render final interpretations of the statute. 453 F. Supp. at 455n.11. We believe this view fails to recognize that the Secretary of Treasury had been delegated rule-making power and that Treasury Regulation 1.411(a)-4(a) is a valid legislative regulation which should be afforded a high degree of deference by the courts.

standards. Accordingly, Treasury Regulation 1.411(a)-4(a) controls our interpretation of the non-forfeiture provision of ERISA. 29 U.S.C. § 1053(a). *See Baker* v. *Otis Elevator Co.*, 609 F.2d 686, 689-92 (3d Cir. 1979).

Workmen's compensation benefits are benefits provided under state law within the meaning of Internal Revenue Service rulings. In considering the nondiscrimination requirement for pension plans under Section 401(a)(5) of the Internal Revenue Code, the Internal Revenue Service has issued revenue rulings that conclude that benefits payable under a workmen's compensation law may be offset against benefits payable under a qualified employees' pension plan. Rev. Rul. 69-421, part 4(j)(4), 1969-2 C.B. 61, 72; Rev. Rul. 68-243, 1968-1 C.B. 157, 158. Accordingly, we agree with the court in *Buczynski*, 616 F.2d at 1244-48, that Treasury Regulation 1-411(a)-4(a) conforms to congressional intent and that Congress was aware of and approved workmen's compensation offsets. *See* H. CONF. REP. NO. 93-1280, 93rd Cong., 2d Sess., *reprinted in* U.S. CODE CONG. & AD. NEWS 5038, 5058 (1974).

Moreover, as defendants contend, the non-forfeiture provision of ERISA, 29 U.S.C. § 1053(a), does not apply to persons who were not actively employed at the time of ERISA's effective date. Section 211(b)(2) of ERISA, 29 U.S.C. § 1061(b)(2), provides that for plans such as the one involved in this case which were in existence prior to 1974, the Act "shall apply in the case of plan years beginning after December 31, 1975." Our review of the legislative history and applicable treasury regulations compels us to conclude that 29 U.S.C. § 1053(a) only protects against forfeiture of benefits of those persons who were active employees on the date the Act became effective. *Fremont* v. *McGraw-Edison Co.*, 606 F.2d 752, 755 (7th

Cir. 1979); *Kapuscinski* v. *Plan Administrator,* No. 8-70443 (E.D. Mich., filed June 19, 1979). *See* S. REP. NO. 93-127, 93rd Cong. 2d Sess., *reprinted in* U.S. CODE CONG. & AD. NEWS 4838, 4856 (1974). Thus, since plaintiff retired in 1972 and was not an active employee during or after the plan year following December 31, 1975, plaintiff is not afforded any protection under the nonforfeiture provision of ERISA, 29 U.S.C. § 1053(a) (1976).

Finally, we conclude that the workmen's compensation offset provision of the Plan does not violate Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1). We agree with the court in *Buczynski* that Treasury Regulation 1.411(a)-4(a), which authorizes the workmen's compensation offset, and the legislative history of the Act,[4] which indicates that Congress did not intend to prohibit workmen's compensation offsets, demonstrate that Article IV § 2 of the Plan does not violate 29 U.S.C. § 1103(c)(1).[5] Accordingly,

---

[4] We will not recite the legislative history that supports our conclusion that the workmen's compensation offset provision does not violate 29 U.S.C. § 1103(c)(1) in light of the excellent discussion of the legislative history by Judge Garth in *Buczynski* v. *General Motors Corporation,* 616 F.2d at 1244-48.

[5] We find particularly pertinent the following statement of defendants:

> [I]t becomes apparent that ERISA § 403(c)(1) cannot be read by its literal language to apply to the benefit of a particular plan participant. A distinction must be made between applying trust assets for the exclusive benefit of the employees versus plan design and plan provisions that may result in a possible lower future funding requirement. Plaintiff's simplistic argument that a speculative indirect benefit

(Footnote continued on following page)

summary judgment may be granted to the defendants.

IT IS SO ORDERED.

ROBERT E. DEMASCIO
United States District Judge

Dated: December 11, 1980

(Footnote continued from preceding page)

to the employer in the form of reduced funding requirements is violative of Section 403(c)(1) cannot be sustained. General Motors makes contributions based on actuarial determinations on behalf of all participants in the aggregate. No contribution is made on behalf of any one employee. The actuarial determination is affected by turnover experience of employees, deaths of employees, projected interest rates, social security benefit integration as well as workmen's compensation benefit integration. When integration is used to determine a benefit, no assets are transferred by bookkeeping entry or otherwise. The assets remain in the plan trust and are not used to fund General Motors workmen's compensation obligation. Indeed, all assets in the trust fund are used to provide benefits exclusively to participants and beneficiaries and cannot be diverted and cannot inure to the benefit of the employer. Memorandum of General Motors Corporation Responding to Plaintiff's Motion for Partial Summary Judgment at 9-10.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL No. 79 73728

PETE DOTSON,

Plaintiff,

v.

SAGINAW PARTS, CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION and GENERAL MOTORS HOURLY RATE EMPLOYEES PENSION PLAN,

Defendants.

Judgment

This cause came before the court on cross motions for summary judgment, and the court having entered its Memorandum Opinion,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED

that defendants have judgment and that the workmen's compensation offset provision in the General Motors Hourly Rate Employee Pension Plan does not violate the Employee Retirement Income Security Act of 1974.

Dated at Detroit, Michigan, this 11th day of December 1980.

ROBERT E. DEMASCIO
United States District Judge

APPENDIX C

Opinion of the United States District Court for the Eastern District of Michigan in *Pavlovic* v. *Chrysler Corporation*, No. 7-70438 (E.D. Mich. Jan. 10, 1978)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION No. 7-70438

MARY PAVLOVIC,

Plaintiff,

v.

CHRYSLER CORPORATION,

Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The facts in this action are not in dispute. Plaintiff first began working for defendant in 1935. On April 17, 1970 she allegedly aggravated an arthritic condition while crossing an assembly line. She continued to work until August 13, 1970 when she was put on a period of allowed sickness and accident benefits. On September 30, 1971 she formally retired at age 58 under the "Permanent Total Disability" provision of the Chrysler-U.A.W. pension plan. On October 1, 1973 plaintiff filed a claim for workmen's

compensation benefits, and on July 17, 1974 she agreed to "redeem" Chrysler's liability for $7,000.00, which Chrysler later paid. The Chrysler-U.A.W. Board of Administration then determined that this workmen's compensation award should be set off against plaintiff's pension benefits pursuant to the terms of §11 of the pension plan, which provides in part that "a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements)." An exception for Workmen's Compensation payments resulting from a claim made within two years of loss of seniority was apparently found inapplicable. Plaintiff was given no pension benefit from April, 1975 through March, 1977 and was given a reduced benefit in April, 1977.

Plaintiff filed the instant action on February 23, 1977 attacking the legality of the offset provision of the pension plan. The court has jurisdiction over this action, without regard to the amount in controversy, by virtue of §502(f) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132(f). Although plaintiff has not explicitly pleaded this statute, it is clear that her claim is that application of the offset provision causes a forfeiture of her vested right to pension benefits, in violation of §203(a) of the Act, which provides in part that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . . " Defendant has filed a motion for summary judgment urging that plaintiff has failed to state a claim under the Act.

One of defendant's contentions is that application of the offset clause does not amount to a forfeiture since ERISA's guarantee "is framed in terms of the benefit determined *under the plan* and it is only that benefit

which is protected." Defendant's Brief at 5. However, regulations interpreting ERISA define "nonforfeitable" as follows:

> (a) *Nonforfeitability.* Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considerd to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. . . . [A] right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time.

Treas. Reg. §1.411(a)-4(a), 42 F.R. 42326 (August 23, 1977). The same definition appears in the now-superseded regulation 26 C.F.R. §11.411(a)-4(a). (Although these are Internal Revenue Service Regulations interpreting the "Minimum Vesting Standards" section of the Internal Revenue Code, 26 U.S.C. §411, they are made applicable to the "Minimum Vesting Standards" provision of ERISA by §3002(c) of ERISA, 29 U.S.C. §1202(c)). Thus, the Act absolutely guarantees benefits which, by the terms of the pension plan, are contingent on subsequent forbearance similar to the requirement in the instant case that beneficiaries not receive workmen's compensation on a claim filed over two years after retirement.

However, the regulation just referred to goes on to add the following clarification:

> [N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may

> be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

Workmen's compensations benefits are benefits provided under State law within the meaning of similar Internal Revenue Service regulations. Rev. Rul. 68-243, 1968-1 C.B. 157. This regulation is consistent with the legislative history and the purpose of ERISA and is presumptively valid. Accordingly, plaintiff's claim based on the alleged "nonforfeitability" of her pension benefits under ERISA is without merit.

Moreover, as defendant also contends, the nonforfeitability provisions of ERISA do not apply to plan participants who, like plaintiff, retired and received pension benefits prior to 1972. §203 of ERISA, 29 U.S.C. §153, applies to plan years beginning after December 31, 1975. 29 U.S.C. §1061(b)(2). Defendant argues that §203 does not apply to this action, since plaintiff's cause of action arose on or about April 1, 1975, the date her pension was first withheld to offset her workmen's compensation award. Although there is case support for this position (*Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005 (N.D. Ohio, 1976)), it is not clear why plaintiff's cause of action could not have arisen on January 1, 1976, when ERISA arguably became applicable to the determination of the pension due her. However this may be, statutory history and administrative regulations make it clear that the Act was not meant to apply to persons who had retired and begun receiving benefits prior to 1974. §203(b)(1)(E) provides that in computing years of service for purposes of determining the non-

forfeitable percentage of a participant's accrued benefits, "years of service before January 1, 1971" may be disregarded "unless the employee has had at least three years of service after December 31, 1970." 29 U.S.C. §1053(b)(1)(E); *see also* 26 C.F.R. 11.411(a)-5(b)(5). A statement by the Hon. Al Ullman, ranking majority member of the House Committee on Ways and Means, explains this provision:

> The purpose of this provision is to avoid imposing on plans very heavy costs for providing retroactive vesting for employees who have already terminated their service. This might jeopardize benefits for employees still covered under the plan and could involve very serious recordkeeping problems.

August 20, 1974, 120 Cong. Rec. H 8702, reprinted in 1974 U.S. Code Cong. & Admin. News at 5168-69; *see also* the statement of the Hon. Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, August 22, 1974, 120 Cong. Rec. S 15737, reprinted in 1974 U.S. Code Cong. & Admin. News at 5180. Any remaining doubt as to the retroacitvity of ERISA was resolved by Treas. Reg. §1.411(a)-2(f), 42 F.R. 42325 (August 23, 1977), which provides as follows:

> *Application of Rules.* The requirements of section 411 do not apply to employees who separate from service with the employer prior to the first plan year to which such requirements apply and who never return to service with the employer in a plan year to which section 411 applies.

Finally, the cases have consistently declined to apply ERISA retroactively—*Keller, supra; Martin* v. *Bankers Trust Co.,* 417 F. Supp. 923 (W.D. Va. 1976); *Carlson* v. *Bundy Corp.,* Civil Action No. 6-72274 (E.D. Mich. 1977) (Pratt, J.).

For all of the foregoing reasons, defendant's motion for summary judgment is GRANTED, and this action will be dismissed.

Dated: January 10, 1978
Detroit, Michigan

CORNELIA G. KENNEDY
Chief United States District Judge

EXHIBIT D

Memorandum Opinion of the United States District Court for the Eastern District of Michigan in *Carlson* v. *Bundy Corporation*, No. 6-72274 (E.D. Mich. Aug. 18, 1977)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION No. 6-72274

ROBERT CARLSON,

Plaintiff,

v.

BUNDY CORPORATION, a Michigan corporation, and the SALARIED PENSION BOARD OF ADMINISTRATION OF BUNDY CORPORATION, jointly and severally,

Defendants.

MEMORANDUM OPINION AND ORDER REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT

The facts relevant to this motion are not in dispute. The only issue before this Court is one of law. Plaintiff retired from the Bundy Corporation on July 1, 1974 at age 55. At that time he had vested rights in the Bundy Corporation's pension plan which was administered by the defendant Salaried Pension Board of Administration of Bundy Tubing (hereinafter Board).

Appendix D

Upon his retirement plaintiff received pension benefits under defendant Bundy Corporation's retirement plan which was entered into between the Corporation and its employees on August 1, 1973. Subsequently, on August 15, 1976 plaintiff was awarded $10,500 under Michigan's Workmen's Compensation laws. The defendant Board thereupon reduced plaintiff's pension payments by the amount of the Workmen's Compensation Award in compliance with the terms of the Pension Plan.[1] Plaintiff seeks summary judgment on Count I of his complaint which alleges that the temporary reduction of pension benefits violates the Employee Retirement Income Security Act of 1974 (hereinafter ERISA), 29 U.S.C. §1001 et seq.[2]

The question before the Court is whether the defendants' action in decreasing plaintiff's benefits violated the terms of ERISA. Defendants established an employee benefit plan as part of their ongoing commercial enterprise. ERISA generally governs the terms and conditions of this type of plan. 29 U.S.C. §1003(a). Plaintiff argues that the defendant's actions contravene the vesting requirements of ERISA. Specifically, plaintiff argues that 29 U.S.C. §1053 (a) requires that all benefits under covered plans must be "nonforfeitable;" and that the defendants' acts constituted an impermissible forfeiture.

---

[1] Plaintiff does not dispute that the Board properly interpreted the provisions of the plan pertinent here, but rather contends that the provision itself violates the Congressional enactment.

[2] Count II, which is not before the Court, alleges that the defendants willfully and maliciously misled plaintiff in violation of their duties as fiduciaries about their willingness to forego any reduction in benefits.

Appendix D

The relevant statute reads:

> "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition [satisfies the time requirements of subsection 2]."
>
> 29 U.S.C. §1053(a).[3]

Defendant first argues that this statute does not apply to this plaintiff because he has not yet reached "normal retirement age." The Act defines normal retirement age as

> "the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the plan."
>
> 29 U.S.C. §1002(24).

Under both the Plan and the Act, the plaintiff's normal retirement age is 65. Plan Article III §3.1. Thus, defendant Board appears to be correct that the terms of §1053(a)

---

[3] 29 U.S.C. §1053(a)(1) does not apply because it refers to pension plans that call for employee contributions. It is uncontested that the plan involved here is entirely funded by the employer.

upon which plaintiff relies do not become operative as to him for another seven years.

Even if plaintiff were able to surmount this threshold issue by showing, for example, that the Plan intends retirement age to be the time an employee elects retirement,[4] he would not prevail. Section 1053(a) provides that the employee's right to his normal retirement benefit must be nonforfeitable.

> "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred *benefit under a pension plan,* which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."
>
> 29 U.S.C. §1002(19). (Emphasis supplied).

This element by its very terms defines nonforfeitable rights in terms of benefits granted by the plan. Thus, where as here, the Plan expressly allows for the reduction in benefits for workmen's compensation payments, no "forfeit" has occurred.[5]

---

[4] Plaintiff argues that under this Plan normal retirement within the meaning of ERISA occurs upon early retirement. This argument rests upon the Act's definition of "accrued benefit." 29 U.S.C. §1002(23). Because it runs contrary to the express definition contained in §1002(24), the Court finds it unpersuasive.

[5] It is well to remember that ERISA merely sets minimum standards for pension plans which are essentially contractual in nature. *Hayes* v. *Krocer Co.*, 78 CCH Labor cases, ¶11,473, p. 21,069 (S.D. Ohio 1976). Moreover, there is some question about whether this is a forfeiture or merely a temporary reduction in benefits. Compare *Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005 (N.D. Ohio 1976) (provision for forfeiture of all benefits if employee works for a competitor contravenes Section 1053).

Appendix D

This interpretation of the Act is consistent with both the purpose of the statute and other sections of the Act. In setting forth its purpose, the Congress stated it was concerned

> ". . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits."
>
> 29 U.S.C. §1001(a).

Congress set out to remedy these deficiencies by requiring better disclosure, reporting and conduct of fiduciaries, by requiring procedures to prevent the dissipation of funds, 29 U.S.C. §1001(b) and by requiring plans "to vest the accrued benefits of employees . . . to meet minimum standards of funding." 29 U.S.C. §1001(c). Thus, it is clear, Congress was primarily concerned with the adequacy of funding of pension plans and the conduct of those who administered retirement funds in order to protect against the danger that individuals would reach retirement age only to find their retirement sustenance dissipated. Congress did not in the Act suggest that it intended to go beyond *minimum* requirements that would preserve the integrity of funds. See *Hewlett-Packard Co.* v. *Barnes*, 425 F.Supp. 1294, 1297 (N.D. Cal. 1977). Thus, it appears

that agreed-upon reductions in benefits to compensate for payments under workmen's compensation plans would not be contrary to the plan's purposes so long as the reduction in benefits was limited to the amount of such benefits paid.

An additional indication of Congressional intent is found elsewhere in the provisions relating to plan participation and vesting. Section 1056(b) of the Act provides:

> "If—
>
> (1) a participant or beneficiary is receiving benefits under the plan . . . a plan may not decrease benefits of such a participant by reason of any increase in the benefit levels payable under title II of the Social Security Act [federal old-age, survivors and disability insurance benefits] or the Railroad Retirement Act of 1937 . . ."
>
> 29 U.S.C. §1056(b).

While Congress has expressly provided that a plan may not reduce pension benefits if a person is awarded money under two specific federal enactments, it did not indicate a similar intention with respect to any state programs. While the Court is hesitant to infer a positive intention from silence, the Court cannot help being influenced by the fact that Congress clearly considered the possibility that other governmental payment might not justify reduction in benefits under any circumstances, but has not extended that protection to workmen's compensation laws. This, in combination with the plain language of the statute and Congress' more clearly articulated purpose, leads the Court to conclude that ERISA does not preclude the portion of

the Plan that temporarily reduced plaintiff's benefits in the amount of his workmen's compensation award.[6]

This disposition makes it unnecessary to consider defendants' contention that ERISA cannot be applied retroactively. Plaintiff's motion for partial summary judgment is therefore denied. Defendants' motion for partial summary judgment on Count I of the complaint is therefore granted. Defendants have made no formal motion for partial summary judgment but Rule 56(c) suggests that when there is no genuine issue of material fact and the issue of law is clear, judgment may be granted.

IT IS SO ORDERED.

PHILIP PRATT
United States District Judge

Dated: August 18, 1977
Detroit, Michigan

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[6] Cases cited by the defendant, *Burroughs Corp.* v. *Teafoe*, Civ. No. 76-70091 (E.D. Mich. Oct. 14, 1976); *Patterson* v. *Southwestern Bell Telephone*, Civ. No. 76-363-C (E.D. Okla. March 22, 1976) and *Fulty* v. *Union Carbide Corp.*, 219 Tenn. 345, 409 S.W.2d 541 (1966) do not consider the effect of ERISA on pension plan provisions such as the one at issue in the instant case and are therefore not on point.

Respectfully submitted,

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Counsel for Respondent.

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OTIS M. SMITH,
General Counsel,
EUGENE L. HARTWIG,
Associate General Counsel,
DAVID M. DAVIS,
General Motors Corporation,
Of Counsel.

No. 80-193

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counterstatement of Questions Presented

1. Does a pension plan that integrates plan benefits with statutory workers' compensation benefits by reducing the one by the other violate §203 of the Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, 29 U.S.C. §1053?

2. Is N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the New Jersey Laws of 1977, preempted by ERISA under the Supremacy Clause and §514(a) of ERISA, 29 U.S.C. §1144(a)?

Parties to the Proceeding

Plaintiffs-Appellees-Petitioners:

Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated

Defendant-Appellant-Respondent:

General Motors Corporation

Intervenor:

State of New Jersey

As Amici Curiae:

Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller and George Zihol

Gray Panthers

Shenango, Inc., U.S. Steel Corp., Crucible Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard and Wheeling-Pittsburgh Steel Corp.

United States (Tax Division, Department of Justice)

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No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

v.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 616 F.2d 1238 and is reproduced in Appendix A to the petition. The opinions of the District Court are reported at 456 F.Supp. 867 and 464 F.Supp. 133.

REASONS FOR DENYING THE WRIT

The Third Circuit correctly decided the issues and its decision is not in conflict with any decisions of this Court or of any other federal court of appeals.

I. The workers' compensation integration provision in the GM Pension Plan is lawful under §203(a) of ERISA, 29 U.S.C. §1053(a).

Article IV, Section 2, of the General Motors Hourly Employees' Pension Plan (hereinafter referred to as the "GM Pension Plan" or the "Plan") provides, in determining the monthly benefits payable under the Plan, for a deduction, under specified circumstances, of certain types of workers' compensation benefit payments. Petitioners are retired employees of respondent, General Motors Corporation, affected by that Plan provision. They urge here, as they did below, that the provision violates ERISA §203(a), 29 U.S.C. §1053(a), which requires, *inter alia,* that every pension plan subject to Title I of ERISA[1] "provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." Petitioners' argument, quite simply, is that (1) §203(a) prohibits all forfeitures of normal retirement benefits upon attainment of normal retirement age, and (2) the deduction for workers' compensation benefits provided in the GM Pension Plan is a forfeiture and, as such, prohibited.

The Third Circuit rejected petitioners' position as based upon the erroneous assumption that all benefit offsets or deductions constitute forfeitures—an assumption inconsistent not only with other provisions of ERISA and its legislative history, but with the express provisions of a regula-

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[1] The GM Pension Plan is subject to Title I of ERISA.

tion, 26 C.F.R. §1.411(a)-4(a) (1979), adopted by the Treasury Department in its exercise of legislative rulemaking expressly delegated to it by ERISA §3002(c), 29 U.S.C. §1202(c), which regulation the Third Circuit found valid.

Petitioners suggest that the decision below is somehow inconsistent with this Court's decision in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation,* 48 U.S. L.W. 4524 (1980). Although *Nachman* was concerned solely with the operation of the pension plan termination provisions of Title IV of ERISA, which are in no way involved in the present case, this Court did make certain observations concerning ERISA §203(a). Petitioners seize upon the observations in note 10 of Mr. Justice Stevens' majority opinion (Slip Op. at 6, 48 U.S.L.W. at 4525-26) and note 9 of Mr. Justice Stewart's dissenting opinion therein (Slip Op. at 5, 48 U.S.L.W. at 4532) as indicating that ERISA §203 and the definition of "nonforfeitable" in ERISA §3(19), 29 U.S.C. §1002(19), preclude any forfeiture or condition to receipt of vested benefits other than one enumerated in ERISA §203(a)(3). However, petitioners overlook this Court's analysis of the concept of "nonforfeitability" in Title I of ERISA, which goes to the heart of its decision in *Nachman.* Looking to the §3(19) definition, Mr. Justice Stevens noted that "the principal subject of the definition is the word 'claim'; it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan' " (Slip Op. at 11, 48 U.S.L.W. at 4527). Then, looking to §203(a), he stated (Slip Op. at 12, 48 U.S.L.W. at 4527):

> [T]he term "forfeiture" normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly de-

> scribed as not causing a forfeiture listed in §203(a)(3), see n. 10, *supra,* describes an event—such as death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of "nonforfeitable" to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect.

This is precisely the rationale of the Third Circuit's opinion below, holding that a deduction from a pension by way of an offset integrating plan benefits with state workers' compensation benefits is not a forfeiture and thus does not fall within §203(a). Indeed, the GM Pension Plan provision at issue itself states clearly that its operation is "in determining the monthly benefits payable under this Plan . . ." Thus, that Plan provision is not one "describing the quality of the participant's right to a pension," but rather one imposing "a limit on the amount he may collect," *i.e.,* by way of integration of Plan and non-Plan benefits.

For the same reason, the case at bar is not in conflict with the decisions of the Second, Seventh, and Eighth Circuits in *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977), *on remand,* 456 F.Supp. 117 (S.D. N.Y. 1978), *aff'd,* 586 F.2d 968 (2d Cir. 1978); *Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979); or *Winer* v. *Edison Brothers Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979). *Riley* was concerned with a suspension of pension plan benefits during a period of reemployment which did not meet the requirements of the exception in §203(a)(3)(B); *Fremont* and *Winer* each involved a total forfeiture of plan benefits under a so-called "bad boy" clause. In both situations, there was a direct effect upon "the quality of

the participant 's right to a pension rather than a limit on the amount he may collect," wholly unlike the case at bar.

Thus, there is no conflict between the decision of the Third Circuit below and that of this Court or any other federal court of appeals.

Petitioners urge that *certiorari* be granted as to this issue because it is important and has not been decided by this Court.[2] However, the Third Circuit's decision is founded upon reasoning fully consistent with prior decisions of this Court. The Third Circuit relied initially upon 26 C.F.R. §1.411(a)-4(a) (1979), which expressly provides that "nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining planned benefits."

This regulation, like the one at issue in the Third Circuit's prior opinion in *Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979), is a "legislative rule" rather than merely an "interpretative rule," exclusive rule-making power having been delegated expressly by Congress to the Secretary of the Treasury in ERISA §3002(c), 29 U.S.C. §1202(c). As this Court held in *Batterton* v. *Francis,* 432 U.S. 416, 426 (1977), such a regulation "can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law."

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[2] Petitioners' references to the number of plans allegedly affected (Petition at 5-6) are devoid of record or other support.

The Third Circuit held that this burden cannot be sustained because the legislative history of ERISA "affirmatively supports the Treasury regulations" (Appendix at 13). Indeed, as merely a "contemporary construction of the statute" by the agency designated to enforce it, this would preclude its rejection, as this Court noted in *Nachman* in the context of this very Treasury regulation and a correlative PBGC regulation (Slip Op. at 13 and nn. 18-19, 48 U.S.L.W. at 4527-28).

It is pertinent here to observe that 26 C.F.R. §1.411(a)-4(a) (1979) has a PBGC cognate in 29 C.F.R. §2605.2 (1979), which[3] defines "pension benefit" in terms of its being a benefit which "in combination with Social Security, Railroad Retirement, *or workmen's compensation benefits* provide a substantially level income to the recipient" (emphasis added). Thus, not one but two agencies to which Congress has expressly delegated rulemaking functions have construed ERISA as authorizing employers to integrate benefits under their private pension plans with benefits under state workers' compensation laws.

In any event, as the Third Circuit correctly concluded, the legislative history of ERISA §203 makes it clear that pension plan provisions taking into account workers' compensation benefits in determining plan benefits, such as the Plan provision at issue herein, remain, since the enactment of ERISA as before, perfectly lawful and proper.

As the Third Circuit noted (Appendix at 19), the primary defect in the analysis of the district court below

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[3] Implementing the PBGC definition of "nonforfeitable" in 29 C.F.R. §2605.6 (1979) cited in *Nachman* (Slip Op. at 13 n. 18, 48 U.S.L.W. at 4527).

is that if offsets of workers' compensation benefits are deemed to constitute forfeitures because they are not expressly "saved" by §203(a)(3), then so also must all offsets of Social Security benefits, also not expressly saved by §203(a)(3). Yet, it is clear beyond dispute that Social Security benefits have consistently been subject to offset under §401(a)(5) of the Internal Revenue Code of 1954, as amended (hereinafter referred to as the "Code"), 26 U.S.C. §401(a)(5),[4] and its predecessor 1939 Code provision,[5] which was reenacted by ERISA with

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[4] The district court below adopted its analysis from that of *Utility Workers Union* v. *Consumers Power Co.*, 453 F.Supp. 447 (E.D. Mich. 1978), *appeal docketed*, No. 78-1402 (6th Cir. Aug. 2, 1978), which was founded upon the mistaken assumption that the source of benefit integration is Code §401(a)(*15*), added by ERISA, which refers only to Social Security benefits, but by way of limitation and not authorization, rather than §401(a)(*5*). Those cases subsequently decided to the same effect by district courts—all prior to the Third Circuit decision herein—adopted the analysis of *Utility Workers* and of the district court below based thereon. *Alessi* v. *Raybestos-Manhattan, Inc.*, Civ. No. 78-0434 (D. N.J. Feb. 15, 1979), *rev'd sub nom. Buczynski* v. *General Motors Corporation*, 616 F.2d 1238 (3d Cir. 1980), *appeal docketed*, No. 79-1943 (U.S. June 10, 1980); *Carpenter Technology Corp.* v. *Boyton*, Civ. No. 78-1415 (D.N.J. Dec. 12, 1979), *modified* (D.N.J. March 7, 1980); *Stong* v. *Bucyrus-Erie Co.*, 472 F.Supp. 1089 (E.D. Wis. 1979), *appeal docketed*, No. 80-1755 (7th Cir. May 23, 1980). In a further case on the subject pending appeal, *Server* v. *Interpace Corporation, appeal docketed*, No. 79-3832 (9th Cir. Dec. 7, 1979), no opinion was rendered. Contra, *Bordine* v. *Evans Product Co.*, 453 F. Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. Jan. 10, 1978); *Carlson* v. *Bundy Corp.*, Civ. No. 6-72774 (E.D. Mich. Aug. 18, 1977).

[5] 26 U.S.C. §165 (I.R.C. 1939), as amended by Revenue Act of 1942, §162, 56 Stat. 798.

amendments irrelevant here, and remain subject to offset under ERISA.[6]

It is, moreover, §401(a)(5)—which provides that "a plan [shall not] be considered discriminatory . . . merely because the contributions or benefits of or on behalf of employees . . . differ because of any retirement benefits created under State or Federal law"—under which the Internal Revenue Service has long held that state workers' compensation benefits may be offset against pension plan benefits.[7] The fact of the amendment of §401(a)(5) without relevant change gives added force to the long-standing Treasury regulation and administrative interpretation thereunder. *Helvering* v. *Winmill,* 305 U.S. 79, 83 (1938).

That this implementation of §401(a)(5) has survived ERISA is indicated by the statement in the Conference Committee Report on ERISA that:

> Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

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[6] References throughout ERISA, *e.g.,* in ERISA §§206(b) and 302(c)(4)(A), 29 U.S.C. §§1056(b) and 1082(c)(4)(A), and their Code equivalents, 26 U.S.C. §§401(a)(15) and 412(c)(4)(A) make this abundantly clear.

[7] Rev. Rul. 68-243, 1968-1 C.B. 157, 158, integrated in Rev. Rul. 69-421, §4(j)(4), 1969-2 C.B. 61, 72, and IRS Pub. No. 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans 15 (1972). See Appendix at 22-23. This ruling was reaffirmed post-ERISA in Rev. Rul. 78-178, 1978-1 C.B. 117.

H. Rep. No. 93-1280, 93d Cong., 2d Sess., p. 277, 3 [1974] U.S. Code Cong. & Admin. News 5038, 5058.

This conclusion is reinforced by the fact that §302(c)(4)(A) of ERISA, 29 U.S.C. §1082(c)(4)(A), and its Code counterpart §412(c)(4)(A), 26 U.S.C. §412(c)(4)(A), expressly provide for taking into account "a change in benefits under the Social Security Act *or in other retirement benefits created under Federal or State law*" (emphasis added)—the very phraseology employed in §401(a)(5)—in determining the minimum funding required for pension benefit plans. If such changes can be taken into account for funding purposes, it can only be because the benefits themselves can be taken into consideration in determining the amount of plan benefits in the first instance.

All of the foregoing, it is submitted, leads inexorably to the conclusion that Congress intended in ERISA to leave intact the preexisting system under which employers were permitted to and did take into account in determining plan benefits various types of nonplan benefits, including specifically workers' compensation benefits; that the Treasury, which urged the result reached by the Third Circuit in its brief below as *amicus curiae*, has faithfully carried out its Congressional delegation of rulemaking power; and that Article IV, Section 2, of the GM Pension Plan is lawful and valid under §203 of ERISA.

II. As applied to the GM Pension Plan, N.J. Stat. Ann. 34:15-29 is expressly preempted by ERISA.

The second issue before the Third Circuit and to which the petition is addressed arises by reason of the enactment of Chapter 156 of the New Jersey Laws of 1977, which, effective July 14, 1977, amended N.J. Stat. Ann.

34:15-29, part of the New Jersey Workers' Compensation Act, to provide that:

> The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

The Third Circuit held that this statute is superseded by ERISA's preemption provision, §514(a), 29 U.S.C. §1144(a), which expressly provides that, with specific exceptions not here applicable, Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" subject to Title I.

Petitioners contend that this holding conflicts with this Court's decisions in *De Canas* v. *Bica,* 424 U.S. 351 (1976), and *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977). Petitioners rely upon *De Canas* largely for its reference to workmen's compensation laws as an example of the broad authority states have under their police powers to regulate the employment relationship to protect workers within the state (424 U.S. at 356). However, *De Canas,* no less than *Jones,* clearly stands for the principle, enunciated in *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963), and restated in *Jones,* that "when Congress has 'unmistakably . . . ordained,' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall" (430 U.S. at 525).

Section 514(a) unmistakably so ordains.[8] The legislative history of §514(a) makes it abundantly clear that, as

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[8] Indeed, even if it did not, the conclusion that §203 sanctions the offsets at issue would compel the conclusion that a contrary result under state law would stand "as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated in presenting the Conference Committee Report on ERISA, it was the intention of Congress "to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans," and that the principle of preemption "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. S15,737 (1974). This intent has been given full effect, absent specific exception within §514, by every court of appeals before which the issue has arisen.[9]

The GM Pension Plan is one subject to Title I of ERISA. On its face, N.J. Stat. Ann. 34:15-29, as amended, "relates to" such pension plans; indeed, as the Third Circuit pointed out, it has no function except in its relation to private pension plans. It is, therefore, preempted expressly by §514(a) under the deliberately broad and all-encompassing sweep of that provision, as the Treasury has urged and as the Third Circuit has held.

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[9] See, *e.g.*, *Wadsworth* v. *Whaland*, 562 F.2d 70, 76-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights and Opportunities*, 603 F.2d 214 (2d Cir. 1979), *aff'g without opinion* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 48 U.S.L.W. 3451 (1980); *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations*, 599 F.2d 205 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3451 (1980); *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd per curiam*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED, *Petitioners,*

vs.

THE GENERAL MOTORS CORPORATION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR CERTIORARI FILED AUGUST 8, 1980

CERTIORARI GRANTED NOVEMBER 3, 1980

Questions Presented

1. Whether a provision in respondent's pension plan which sanctions a forfeiture of vested retirement benefits by offsetting the amount of a subsequent workers' compensation award against the retiree's pension is unlawful under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1053.

2. Whether Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. 1144.

Parties to the Proceeding

Petitioners in Case No. 80-193:

Henry Buczynski, Alex Borusovic and Other Retirees Similarly Situated

Respondent in Case No. 80-193:

The General Motors Corporation

Intervenor:

State of New Jersey

As Amicus Curiae:

Carmen F. Gargon, Frank E. Doumont, Robert Milanovich, Wayne C. Banks, Michael E. Barna, Paul J. Miller and George Zihol

Gray Panthers

Shenango, Inc., U.S. Steel Corp., Crucible, Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard and Wheeling-Pittsburgh Steel Corp.

United States (Tax Division, Department of Justice)

Appellants in Case No. 79-1943:

Joseph Allessi, Raymond Buisson, Stephen Michalski, Charles Repka, Helen Vogt and T. Edward White

Appellees in Case No. 79-1943:

Raybestos-Manhattan, Inc. and Raybestos-Manhattan, Inc. Employee Retirement Plan

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No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 616 F.2d 1238 and is reproduced at page 89a of the Joint Appendix. The opinions of the United States District Court, District of New Jersey, in *Buczynski* are reported at 456 F.Supp. 133, and are reproduced in the Joint Appendix at pages 54a and 70a respectively. *Alessi* (Docket No. 79-1534) was unreported at the District Court level.

Statement of Jurisdiction

The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1).

The Judgement of the Court of Appeals (J.A. 119a) was entered on February 15, 1980. Said Judgment was

certified and issued in lieu of a formal mandate on March 27, 1980 (J.A. 122a).

A timely Petition for Re-hearing was filed and was denied on March 19, 1980. On June 2, 1980, Justice Brennan of this Honorable Court entered an Order Extending Time to File Petition for Writ of Certiorari to August 16, 1980.

A Petition for a Writ of Certiorari to the United Court of Appeals for the Third Circuit was timely filed and said Writ was granted by this Court on November 3, 1980. The case was consolidated with *Joseph Alessi et al.* v. *Raybestos-Manhattan, Inc., et al.,* No. 79-1943, where probable jurisdiction was noted on the same date.

Statutes and Regulations Involved

The following Statutes and Regulations which are primarily involved in this case are set forth fully in the Appendix to this Brief:

26 U.S.C. §401(a)(5)
29 U.S.C. §1002(19)
29 U.S.C. §1053(a)
29 U.S.C. §1144(a)
N.J.S.A. 34:15-29
26 C.F.R. §1.411(a)-4(a)

Statement of the Case

On August 5, 1977, plaintiff-petitioners Henry Buczynski and Alex Borusovic, on behalf of themselves and "all other retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, similarly situated," instituted the instant action against The General Motors Hourly-Rate Employees Pension Plan (hereinafter referred to as the GM Pension Plan) (J.A. 8a).

The plaintiffs are all retired employees of the General Motors Corporation who, at the time of their retirement,

were employed by the General Motors Corporation in New Jersey. Each member of the plaintiff class was receiving a retirement pension under the GM Pension Plan when he collected a workers' compensation award for a work-related injury. Plaintiff Buczynski received approximately $2500.00 and plaintiff Borusovic received approximately $2300.00. The petitioners subsequently suffered a total loss from their pensions equal to the amount of the compensation awards.

Article IV, §2 of the GM Pension Plan provides:

> Section 2. Deductions of Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made *unless prohibited by law,* equivalent to all or any part of the Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:
>
> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for the loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority.

Petitioners contended that the offset against their retirement pensions in the amount of the workers' compensation awards constituted a total forfeiture of vested retirement benefits in violation of the anti-forfeiture provisions of §203 of E.R.I.S.A., 29 U.S.C. §1053. Additionally, petitioners maintained that this offset violated Chapter 156 of the Laws of 1977 of the State of New Jersey, N.J.S.A. 34:15-29, which provides:

> The right of compensation granted by this chapter [the New Jersey Workers' Compensation Act] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

This action, originally filed in the Superior Court of the State of New Jersey, was removed, on August 9, 1977, to the United States District Court of the District of New Jersey (J.A. 18a). On August 9, 1978 an Order certifying class action was entered by consent of the parties pursuant to Federal Rule of Civil Procedure 23(b)(2) (J.A. 52a). On August 24, 1978 the District Court issued a Memorandum Opinion (J.A. 54a) in which it held that Section 2 of Article IV of the GM Pension Plan constituted an illegal forfeiture of vested pension benefits under §203(a) of E.R.I.S.A., 29 U.S.C. §1053(a). The Court also determined that Chapter 156 of the New Jersey Laws was not pre-empted by E.R.I.S.A. Upon a motion by the respondent for reconsideration, the District Court, on December 20, 1978, issued a second Opinion and an Order reaffirming its previous Decision (J.A. 70a).

Upon appeal by respondent General Motors Corporation, and with the consolidation of the above-captioned case with the unreported decision in *Joseph Alessi, et al.* v. *Raybestos-Manhatten, Inc., et al.,* which invalidated a similar pension plan provision, a three judge panel for the United States Court of Appeals for the Third Circuit reversed the decision of the District Court and remanded the case to

that Court for the entry of judgment in favor of the General Motors Corporation (J.A. 119a).

On November 3, 1980, this honorable Court granted plaintiffs' Petition for a Writ of Certiorari and consolidated this matter with the *Alessi* case, in which probable jurisdiction was noted by this Court on that same day (J.A. 124a).

Summary of Argument

The General Motors Corporation Hourly Rate Employees Pension Plan contains a clause authorizing a forfeiture of vested retirement pension benefits by the amount of a workers' compensation award unless such forfeiture is prohibited by law.

Petitioners contend that section 203(a) of ERISA, 29 U.S.C. §1053(a) prohibits offsets of workers' compensation awards against vested retirement pensions in accord with the definition of "nonforfeitable" found in section 3(19) of ERISA, 29 U.S.C. §1002(19). As a deduction for workers' compensation does not appear anyplace in 29 U.S.C. §1053(a), it constitutes an illegal forfeiture.

It is also contended by Petitioners that Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 prohibits the offset of workers' compensation awards against vested retirement pensions. The New Jersey law is a proper exercise of the state's police power in which it has a strong and traditional interest to protect the rights of its working citizens and is not pre-empted by 29 U.S.C. §1144(a).

In its decision below, the Court of Appeals for the Third Circuit held that an offset for workers' compensation awards was not a forfeiture of vested pension benefits made illegal by 29 U.S.C. §1053(a) or §1002(19). It found implicit statutory approval of deductions for Social Security benefits and inferred that workers' compensation awards were similar enough to Social Security benefits to

be permissably offset without violating ERISA. That Court found that the contested offset was specifically authorized by 26 C.F.R. §1.411(a)-4(a) and that this Treasury regulation was a valid "legislative" regulation.

The Court below also held that 29 U.S.C. §1144(a) preempted Chapter 156 of the New Jersey Laws of 1977 which expressly prohibited the offset of workers' compensation awards issued by New Jersey courts against retirement pensions. Consequently, the Court found that Chapter 156 did not prohibit the offset in dispute.

The Court of Appeals reversed, on both issues, the decision of the District Court.

It is respectfully argued by Petitioners herein that the Court of Appeals erred on both issues. The clear, statutory language of ERISA prohibits the total loss of vested pension benefits except as specifically delineated in the Act and no exception for workers' compensation is listed anywhere in the Act. The legislative history of ERISA indicates that Congress intended to strictly limit forfeitures in order to protect employees' rights to receive pension benefits. In that a conflict can be seen between the statute and 26 C.F.R. §1.411(a)-4(a), the Regulation is a nullity. The Court below failed to account for the fundamental distinction between workers' compensation awards and retirement or Social Security benefits. Furthermore, there is no legislative history supporting the proposition that Congress intended to include workers' compensation as a permissable offset.

N.J.S.A. 34:15-29 is also contended by petitioners to be a valid exercise of state authority. It is part of the New Jersey Workers' Compensation Act and intended to protect awards validly adjudicated by that State's Courts.

ARGUMENT

I. The provisions of the General Motors Corporation Pension Plan which forfeit an injured retiree's vested pension benefits by the amount of workers' compensation subsequently received violates the vesting and nonforeitability provisions of §203(a) and 3(19) of ERISA, 29 U.S.C. §1053(a) and 1002(19).

A. The clear and unambiguous language, history and purpose of ERISA plainly establish that a retiree's rights to a vested pension cannot be lost, forfeited, expended or offset for any reason except those specifically enumerated exceptions delineated in the Act.

The scope and purpose of the Employee Retirement Income Security Act of 1974 (ERISA), is to provide a comprehensive nationwide Federal program for the protection of a retiree's accrued, vested pension benefits. This Act caused a major reformation in existing pension practices and signified a major shift in public policy regarding private pensions from a tax based orientation to one more fundamentally related and concerned with employee retirement income security. Greenough & King, *Pension Plans and Public Policy,* (Columbia, 1976) at 67.

Congressional policy, as embodied in the language and legislative history of ERISA makes clear that ERISA was enacted to improve "the equitable character of private pension plans by requiring them to vest the accrued benefits of employees with significant periods of service." See §2(c) of ERISA, 29 U.S.C. §1001(c). See also, *Reuther* v. *Trustees of Trucking Employees of Passaic and Bergen County Welfare Fund,* 575 F.2d 1074 (3d Cir. 1978). Moreover, Congressional policy declares that with the passage of ERISA, retired workers would not lose "anticipated retirement benefits owing to the lack of vesting in such [pension] plans . . ." §2(a) of ERISA, 29 U.S.C. §1001(a).

Legislative history completely supports the statutory

declaration of policy. The House Labor Committee Report states that ERISA's:

> most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in necessities to sustain them as human beings within our socitey. H.R. Rept. R. 93-533, 93d Cong., First Sess., reprinted in (1974), *U.S. Code Cong. & Ad. News* at 4646.

This Court in its most recent decision in *Nachman Corporation* v. *Pension Benefit Guarantee Corp., et al.*, —— U.S. ——, 48 U.S.L.W. 4524, 4528 (No. 78-1557, decided May 12, 1980), reviewed, for the first time, the vesting and nonforfeitability requirements of the Act and affirmed the above-described declaration of Congressional policy and intent. Justice Stevens, writing for the majority, reasoned that ERISA was enacted to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid. This Court in *Nachman,* also declared that Congress had enacted ERISA to prevent the deprivation of "anticipated benefits." 48 U.S.L.W. at 4528.

In order to implement the unambiguous Congressional policy in ERISA, the Act requires that a retiree's rights to his accrued vested pension benefits be nonforfeitable. The House Ways and Means Committee and Senate Finance Committee reported that vesting and nonforfeitability requirements were needed to guarantee that workers received these long awaited pensions:

> Quite apart from the resulting hardship, your Committee believes that such loss of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefits which he would have received." *U.S. Code Cong. & Ad. News, supra,* at 4719 and 4930.

In order to implement this intent, Congress established a general rule of nonforfeitability of vested pension rights under §203 of ERISA, 29 U.S.C. §1053 and §3(19) of ERISA, 29 U.S.C. §1002(19). These two sections provide the time limits and circumstance within which an employee's pension benefits become vested and nonforfeitable. Specifically, §203(a), 29 U.S.C. §1053(a) states:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . .

Section 203(a)(2) of ERISA, 29 U.S.C. §1053(a)(2), provides several alternative "minimum" vesting schedules. The GMC plan has adopted the §203(a)(2)(A) schedule which provides that:

> (A) A plan satisfies the requirements of this subparagraph [participant vesting requirement] if an employee who has at least ten years of service has a nonforfeitable right to 100% of his accrued benefit derived from employer contributions.

Under this plan, a participant who completes ten years of service has at that moment, a vested, nonforfeitable right to receive, when he attains normal retirement age, all retirement benefits derived from employer contributions which he has accrued to that period. The only conditions which he must meet to qualify for the vesting of his accrued pension benefits are the age and years of service requirements under the above-enumerated vesting schedule. It is undisputed that under this schedule, the above-named petitioners satisfied all vesting requirements with regard to age and years of service.

Section 3(19) of ERISA, 29 U.S.C. §1002(19), defines the term "nonforfeitable" when used with respect to a pension benefit or right, as:

> [A] claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from participant's service, which is unconditional, and which is legally enforceable against a plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because a plan contained a provision described in §1053(a)(3) of this Title".[1]

The importance of the rule of nonforfeitability to the effect of the Act is paramount. It is a primary focus of ERISA that a plan participant's pension benefits, once vested, are not to be forfeitable for any reason other than the exceptions delineated.[2]

This formulation is strongly supported by the Congressional legislative history that a retiree's vested pension benefits cannot be subsequently conditioned, lost or forfeited, subject only to the Act's enumerated and limited exceptions.

The House Labor Committee Report specifically states:

> With the limited exceptions noted above, no rights, once they are required to be vested, may be lost by

---

[1] Section 203(a)(3) of ERISA.

[2] The specific exceptions of §203(a)(3) of ERISA, 29 U.S.C. §1053(a)(3) provide that a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides for the:

1. Nonpayment upon a participant's death.
2. Suspension of pension upon the employer's rehiring of the participant.
3. Benefits lost because of certain retroactive plan amendments.
4. Forfeiture of pension if the employee withdraws his mandatory contribution and is less than 50% vested.

It is undisputed that these exceptions are not relevant in the above-captioned case.

> the employee under any circumstances. *U.S. Code Cong. & Ad News* at 4725 (1974).

The Report previously stated that imposing vesting requirements will:

> . . . limit the conditions precedent to receipt of pension rights and will eliminate most of the situations where workers have lost out on their pension. *supra,* at 4651 (1974).

Perhaps the clearest statement contained in the legislative history of ERISA regarding nonforfeitability was in the House Senate Conference Committee Report which said:

> Except as outlined below (the express exceptions), an employee's rights, once vested, are not to be forfeitable for any reason. *U.S. Code Cong & Ad. News,* at 5052 (1974).

Indeed, Congress expressly intended that the imposition of vesting requirements would prevent the loss of anticipated and accrued vested pension benefits for any reason. Article IV, §2 of the General Motors Hourly Rate Empolyee's Pension Plan places an impermissible condition to the actual receipt of vested pension benefits by requiring forbearance of the exercise of statutory rights under state workers' compensation and occupational disease laws. By exercising such rights, petitioners, as well as other class members, would then suffer a forfeiture of vested pension benefits in an amount equal to the compensation award.

Being entirely vested, plan participants should have a nonforfeitable right to 100% of their accrued pension benefits. Nowhere within the above-enumerated sections or exceptions in the Act, is there a provision excepting offsets of workers' compensation recoveries from the general nonforfeitability requirements of §203(a) of ERISA, 29 U.S.C. §1053(a).

Therefore, the implementation of the workers' compensation forfeiture provision allows the Plan to suspend, offset and forfeit vested retirement benefits by the amount of workers' compensation awards, subsequent to the commencement of payment of those retirement pensions, by the Plan. The only way a plan participant can receive 100% of his vested retirement benefits which under §1053(a)(2) were independently earned in the form of deferred compensation, is to forego bringing a claim for injuries sustained in the course of employment under the New Jersey Workers' Compensation Act. This is an untenable provision violative of the clear and unambiguous language and history of the Act.

Congress made no exception to the general rule of nonforfeitability for the integration or offsets of workers' compensation awards from accused vested pension benefits. Rather, it acted to preserve the long-deferred pensions of employees by mandating that vested rights would not be lost for any reason except for those specifically enumerated exceptions in the Act. There is no statutory language or legislative history in which Congress endorses the concept of workers' compensation forfeitures or offsets as permitted exceptions under ERISA. The GMC plan provision which permits the forfeiture of vested pension benefits must be declared void under the unambiguous legislative history, the language, and purpose of ERISA.

It is clear that Congress, in drafting the vesting and nonforfeitability requirements of ERISA, intended to prohibit any provision which would forfeit, suspend, offset or reduce the amount of already accrued vested pension benefits a worker expects to have upon his retirement. The history, language and purpose of ERISA demonstrates that Congress intended that each pension plan participant should maintain and ultimately receive all vested benefits accrued as of any given date.

B. The weight of judicial authority concerning ERISA supports petitioners' contention that the GMC plan's workers' compensation offset against vested retirement pensions violates the vesting and nonforfeiture requirements of the Act.

The United States Supreme Court in *Nachman, supra,* held that a collectively bargained plan provision disclaiming employer liability for pension fund deficiencies does not render such benefits forfeitable, since the provision did not qualify the right against the plan for the full amount but merely limited the source of collection to which a retiree remained fully entitled.

In arriving at this holding, this Court was called upon to give its interpretation of §§3(19) and 203 of ERISA and recognized the importance and the sweeping nature of the vesting and nonforfeitability requirements. This Court observed that any provision in a plan which sanctions a forfeiture of vested benefits, other than those enumerated, is made illegal by ERISA. The majority observed:

> Section 203(a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements, no greater than those specified in §203(a)(2) as not subject to forfeiture. A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection §(a)(3) would violate this section after January 1, 1976, its effective date. 48 U.S.L.W. at 4526 n. 10.

In analyzing ERISA, Justice Stevens noted that this major pension reform act was enacted to make ". . . sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever

conditions are required to obtain a vested benefit—that he actually receive it." There is no question that the GMC Plan is a "defined pension benefit" plan. The petitioners herein have fulfilled those conditions required to obtain vested benefits, i.e., they have met the age and service requirements of §203(a)(3) of ERISA, 29 U.S.C. §1053(a)(3). Therefore they are entitled to actually receiving the full amount of their vested retirement pension benefits. These petitioners have suffered a total forfeiture of their vested pension benefits during the time respondents applied the workers' compensation offset provision.

The *Nachman* court in noting "that the terms 'vested' and 'nonforfeitable' were used synonomously" in ERISA, 48 U.S.L.W. at 4528 also referred to the Title I definition of "vested liabilities" which provided that:

> The term vested liabilities means that present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable. *Id.*

It is therefore logical to conclude that for the purposes of Title I, "vested" is synonomous with "nonforfeitable". The *Nachman* court maintained that Congress clearly intended to invalidate any pension plan provision which forfeits or limits the rights of retirees to their vested pension benefits. Specifically, the Court stated that:

> A provision in a plan which is construed as a condition, the failure of which would cause a forfeiture, would be invalid after January 1, 1976. 48 U.S.L.W. at 4528 n. 19.

It is important to note that Justice Stewart, in his dissent in *Nachman,* reiterates and concurs with the majority to the extent that they define the term "nonforfeitable" as precluding any "conditions" to the receipt of vested pension benefits. Justice Stewart referred ap-

provingly to the comments of Representative Perkins, a leading sponsor of ERISA:

> As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definition of "nonforfeitable", almost identical to that contained in 29 U.S.C. §1002(19) as finally enacted: 'The definition of the term "nonforfeitable" is intended to preclude any conditions to receipt of vested benefits other than those noted in the definition.' 48 U.S.L.W. at 4532, (n)(9).

Furthermore, the dissenting opinion, while reviewing regulations by the Pension Benefit Guaranty Corporation maintained that:

> [I]nsofar as the Pension Benefit Guaranty Corporation's own definition of "nonforfeitable", see 29 C.F.R. §2605.6(a), departs from §1002(19), it must be rejected. Nothing in the Act or in the legislative history reflects a Congressional intent to give Pension Benefit Guaranty Corporation the authority to define the scope of its own entitlement to employer assets." 48 U.S.L.W. at 4531, n. 5.

Furthermore, Justice Stewart reasoned that:

> To the extent that Pension Benefit Guaranty Corporation's own self-serving definition in 29 C.F.R. §2605.6(a) points in a different direction, it conflicts with the statute and can be accorded no weight." 48 U.S.L.W. at 4532, n. 10.

Thus, the only expression by the United States Supreme Court as to the meaning of §203 and §3(19) of ERISA clearly demonstrates that the vesting and nonforfeiture requirements of ERISA invalidates any provision which purports to sanction a forfeiture of vested pension benefits, or condition the receipt of accrued vested benefits, by any reason other than those enumerated in the Act.

In the instant situation, Article IV, §2 of the GMC Plan purports to forfeit and nullify entirely a petitioner's claim to his vested benefits guaranteed by §203 and 3(19) of ERISA by the amount subsequently received through a workers' compensation recovery. It becomes apparent that upon completion of ten years service, a pension right vests to 100% of accrued benefits contributed by his employer. Section 203(a)(2) of ERISA, 29 U.S.C. §1053 (a)(2). Vesting is synonomous with nonforfeitable. *Nachman, supra.* A pensioner's accrued retirement benefit, once vested, becomes nonforfeitable and cannot be lost except under the limited situations defined in the Act. The workers' compensation forfeiture is not within those exceptions. The GMC Plan provision, which conditions the receipt of the full vested pension benefit upon the forebearance of the workers' compensation claim works a forfeiture on the vested retirement pension in violation of the nonforfeitability requirements of the Act.

In addition to the decision in *Nachman,* the overwhelming weight of judicial authority under ERISA prior to *Buczynski,* supports the proposition that the offset of workers' compensation payments constitute unlawful forfeitures of injured retirees' vested rights violative of the vesting and nonforfeitability requirements of the Act.

The first major decision invalidating a workers' compensation offset provision in a pension plan (also the most recent decision from the United States District Court for the Eastern District of Michigan) is *Utility Workers Union of America* v. *Consumers Power Co.*, 453 F.Supp. 447 (E.D. Mich. 1978). The decision in *Utility Workers* is in full accord with this Honorable Court's language and interpretation of §203 of ERISA in *Nachman.* The District Court reasoned that "the plight of the worker apparently prompted the broad nonforfeitability language of §203(a), 29 U.S.C. §1053(a). 453 F.Supp. at 454. That Court, drawing upon the legislative history of the act, stated:

> Congress did not intend to exempt workers' compensation payments from the nonforfeitability requirements of ERISA . . . the workmen's compensation offset provision of this pension plan places a condition on the plaintiff's claim to monthly benefits which makes that claim legally unenforceable against the plan. It therefore constitutes a forfeiture as that term is used in ERISA. The language of the statute is clear and unambiguous. The reasoning of the defendant is tenuous and speculative. The Court chooses to follow the plain meaning of the statutory language. *Id.* at 456.

In *Stong* v. *Bucyrus-Erie Co. and Bucyrus Hourly Retirement Plan,* 472 F.Supp. 1088 (E.D. Wi. 1979), recon. denied, (December 10, 1979), and currently pending before the United States Court of Appeals for the Seventh Circuit, Judge Gordon, writing for the majority, presented a thorough and well-reasoned analysis of the vesting and nonforfeitability provisions of ERISA. The Court held in clear and unmistakeable language that:

> The statute [ERISA] applies unambiguously to this case: the pension plan must provide that an employee's right to his normal retirement benefits is nonforfeitable; a nonforfeitable right is unconditional and legally enforceable against the plan; the workers' compensation offset provided in the defendant's pension plan imposes a condition subsequent on employee's right to normal retirement benefits; the imposition of this condition makes an employee's claim forfeitable within the meaning of §1002(19) and therefore violates Subsection 1053(a). See *Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 409 (2d. Cir. 1977), *Utility Workers, supra,* at 456. In my opinion, no other conclusion could be reached without seriously upsetting the intent of Congress as manifested in the plain meaning of the Act. 472 F. Supp. at 1091.

Another decision invalidating workers' compensation offset provisions is *Server* v. *Interspace Corp.*, Appeal Docketed No. 79-3832 (9th Cir. December 7, 1979). Of course, the lower court decision for the District of New Jersey, in *Buczynski* and *Alessi,* invalidated workers' compensation offsets but were reversed by the three judge panel for the United States Court of Appeals of the Third Circuit in *Buczynski.* The court in *Carpenter Technology Corp.* v. *Boyton,* Civ. No. 78-1415 (D.N.J. December 12, 1979), modified (D.N.J. March 7, 1980) also held that T. Reg. 1.411(a)-4(a) was contrary to vesting provisions in ERISA, prior to being modified to accord with *Buczynski.*

Two minor decisions of the United States District Court for the Eastern District of Michigan, decided prior to *Utility Workers,* arrived at contrary conclusions. *Bordine* v. *Evans Product Co.*, 453 F.Supp. 19 (E.D. Mich. 1978), and *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January, 10, 1978), are both erroneous in their conclusions due to the excessive reliance upon treasury regulations enacted under the Internal Revenue Code of 1954 and their complete disregard of the unambiguous language of §203 of ERISA, 29 U.S.C. §1053(a). Both of these decisions also failed to address or discuss the clear statutory language and legislative history surrounding ERISA. Moreover, Judge Pratt reversed his earlier decision in *Carlson* v. *Bundy Manufacturing Co.*, Civ. No. 6-72274 (E.D. Mich. August 18, 1977), in *Utility Workers,* where he maintained that:

> The conclusion of the Court reached in *Carlson,* that an offset contained in a plan, if reasonable, is permissible, resulted from excessive attention to the phrase under the plan found in the definitional section of ERISA, 29 U.S.C. §1002(22), (23), 'accrued benefit' and 'normal retirement benefit'. The proper question is not whether the plans provisions are reasonable, but whether they are contrary to the statute, *supra,* at 452, n. 8.

Furthermore, *Pavlovic* is also distinguishable for its reference to the subsequently overruled decision of Judge Pratt in *Carlson*. It should also be noted that the decisions in *Bordine* and *Pavlovic* were rejected by the later decision in *Stong*.

Other cases decided under 29 U.S.C. §1053(a), though not dealing specifically with workers' compensation offsets, are quite relevant to show that any pension forfeitures, absent the limited exceptions, violate ERISA. In *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977), the Second Circuit Court of Appeals, citing the House Labor Committee Report, discussed *infra,* held:

> When §203(a)(3)(B) [29 U.S.C. §1053(a)(3)(B)] provides that certain suspensions [of pension benefits] are not forfeitures, it necessarily implied that those not falling within its terms *are.*"

The *Riley* Court determined that whether an employee's pension benefits were regarded as suspended or terminated had no significance with respect to its violation of ERISA's nonforfeiture and vesting provisions. Moreover, the *Riley* Court observed that the language of ERISA required a strict reading of the term "nonforfeitable" since it is specifically and broadly defined in §3(19) of ERISA. The Court ruled that:

> As regards employer contributions, the employee's right must be nonforfeitable if he has met certain conditions relating to age and years of service which Riley concededly has done. Section 3(19), 29 U.S.C. §1002(19) defines 'nonforfeitable' as meaning, among other things, a claim 'which is unconditional and which is legally enforceable against the plan.' The provision of Article II A, §13, quoted above, fn. 2, places a condition on Riley's claim to the monthly benefits to which he otherwise would be entitled and makes his claim legally unenforce-

> able against the Plan; it thus constitutes a forfeiture within the meaning of ERISA.

Thus, *Riley* further urges this Court to hold that the instant offset and reduction of retirement benefits imposed by the GMC Plan constitutes an impermissible forfeiture of vested benefits. Just as Riley's claim to monthly benefits was conditioned (upon his not working in the maritime industry), the claims of the individual plaintiffs here are also conditioned (upon their not receiving workers' compensation benefits). The *Riley* Court concluded that "each month's denial constitutes a separate forfeiture and a separate wrong" under ERISA. 570 F.2d at 411.

In *Winer* v. *Edison Brothers Stores Pension Plan,* 447 F.Supp. 836, 837 (E.D. Mo. 1978), the lower Court stated:

> The Act (ERISA) was intended to protect employee's rights in their pension plans. Forfeitures, absent specific exceptions, are disfavored.

See also, *Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979).

On appeal in *Winer* v. *Edison Bros. Stores Pension Plan,* 593 A.2d 307 (8th Cir. 1979), the United States Court of Appeals for the Eighth Circuit was asked to determine whether a specific provision in a pension plan was permissible under ERISA. In particular, the pension plan provision involved whether a Retirement Committee could deny vested rights to employees who engage in so-called bad conduct. The plan argued in that case that ERISA did not alter their ability to interpret and apply the terms of the plan and that the interpretation was binding on the court. The *Winer* court held this argument was defective and that the plan provisions operated as an automatic forfeiture, which was inconsistent with the remedial purposes of ERISA. The *Winer* court concluded that such a system in effect constituted

a prohibited forfeiture of vested pension rights, contrary to ERISA.

As in the instant case, a plan provision cannot be validated simply because it is one of the terms of the plan. A workers' compensation offset of vested pension benefits cannot be authorized under such a rationale. Accordingly, the GMC forfeiture provision must fall.

In addition, in *Keller* v. *Graphic Systems of Akron, Inc., Employees' Profit Sharing Plan,* 422 F.Supp. 1005 (N.D. Ohio 1976), the Court stated that:

> §1053 of ERISA sets forth minimum vesting standards for private retirement plans which assure employees of attaining vested rights to benefit after a stated period of service. 19 U.S.C. §1053. It further delineates a limited number of situations in which an employee's vested rights to benefit may be forfeited. Thus as explained in House Conference Report No. 93-1280, with the exceptions specifically provided for in §1053(a)(3) 'an employee's rights, once vested, are not to be forfeitable for any reason.' *supra,* at 1008.

Several other cases decided under ERISA also give clear indication that the Congress' strong purpose and intent in enacting ERISA was to protect employees from having their vested pension benefits deducted, offset or forfeited. For example, in *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 431 F.Supp. 271, 277 (E.D. Pa. 1977), it was determined:

> ERISA was enacted to protect pension plan participants and beneficiaries. Exculpation from any of the rights conferred cannot be permitted if the Act is to remain faithful to its mandate.

Further, in *Amory* v. *Boyden Associates, Inc.,* 434 F. Supp. 671 (S.D.N.Y. 1976), the Court reasoned that all forfeitures under ERISA are *per se void.* These cases

further express and reemphasize the overwhelming judicial authorities which have held that forfeitures, in particular workers' compensation and occupational disease offsets, are violative of ERISA and are hence void. As expressed by the Court in *Mosley* v. *National Maritime Union Pension and Welfare Plan,* 438 F.Supp. 413 (E.D. N.Y. 1977), the purpose of ERISA was to "remedy the significant defects covered in the structures" of many of the earlier pension plans. Such defects included many unfair and arbitrary provisions, *Mosley, supra,* at 422, which operated as forfeitures of retirement pension benefits.

In light of the above-mentioned judicial decision, as well as the language, history and purpose of ERISA, it becomes quite clear that the decision in *Buczynski,* stands alone as an abberation in the area of retirement income security. Even a cursory reading of the opinion in *Buczynski* makes it quite clear that the court, for some inescapable reason, fails to address or even consider the concept of *vesting* of retirement pension benefits under §203(a) of ERISA. This Court in *Nachman* and all the other decisions, cited above indicate that the vesting protections of ERISA were a major purpose and reason for the passage of this Act. ERISA must provide security to retired pensioner's pension benefits; the Act, as interpreted by *Buczynski,* would be a nullity. ERISA is an "employee-oriented" Act, which is to be interpreted by "equitable principles". See *Reuther.* There is no equity, security or vesting protection for plan participants if the law is, as stated by the lower court in *Buczynski.*

The GMC Plan in question, affects the vested pension benefit itself and eliminates a participant's claim to that portion of his already vested benefits that is reduced because of a separate workers' compensation recovery. There is no statutory language or any legislative history which permits workers' compensation offsets. There are no other interpretations which can be supported by ERISA.

The offset of vested retirement pension benefits by the concurrent receipt of workers' compensation payments is an impermissible forfeiture which must be declared illegal and void under the Act.

C. The clear language of 29 U.S.C. §1053 supercedes contradictory Treasury Regulations and Revenue Rulings, making the offset of workers' compensation awards against vested retirement benefits prohibited.

The failure to distinguish the unique nature of workers' compensation awards from retirement pensions and Social Security benefits is a fundamental error in the decision of the Court below, the argument of defendant-respondent and the position of the Treasury Department in its issuance of certain regulations and subsequent Revenue Rulings. This error is manifest in the Court of Appeals approval of the I.R.S.' impermissable expansion of clear statutory language.

The Court below began its inquiry into the legality of the workers' compensation offset by analyzing 26 C.F.R. §1.411(a)-4(a) (1979), rather than starting with the superior expression of the law—the statute itself. [J.A. 99a] In relevant part the regulation states:

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or any other Federal or State law and which are taken into account in determining plan benefits.

The Court of Appeals noted that the regulation was issued under 26 U.S.C. §411, the Internal Revenue Code's anti-forfeiture provision which is substantally identical to §203 of ERISA, 29 U.S.C. §1053. See J.A. 98a, n. 8. Both sections concern the general requirement of non-forfeitability of benefits except for the same exceptions appearing in each respective section (none of which is relevant to this case).

An examination of 26 U.S.C. §411 (or 29 U.S.C. §1053) reveals that nowhere in that statutory provision is there authorization by Congress permitting an offset of workers' compensation awards against a nonforfeitable pension right and the pension right remaining nonforfeitable.

Although the regulation purports to interpret 26 U.S.C. §411, it seems obvious that it is an attempt to incorporate §401(a)(5) of the Internal Revenue Code, 26 U.S.C. §401 (a)(5). This section of the Code provides that a pension plan shall be qualified and not "be considered discriminatory . . . because the contributions or benefits of or on behalf of employees . . . differ because of any retirement benefits created under State or Federal law." Defendant-respondent has claimed this section as the statutory source permitting the offset contested in this case. The Court of Appeals has also relied on this provision as the basis for justifying the offset and related Trasury regulations.

The Court below also relied heavily on its interpretation of 26 U.S.C. §401(a)(15) to justify the offset. This provision, enacted concurrently to, but separate from the passage of ERISA, disqualifies plans unless penions "are not decreased by reason of any increase" in Social Security benefit levels obtained at the earlier date of benefit receipt or separation from employment. §401(a)(15) specifically limited the amount of permissible Social Security offsets. In concluding that §§401(a)(5) and (15) authorize the offset of workers' compensation awards against vested retirement pensions, the Court of Appeals has approved the subversion of Congress' plain and intended language.

The Court, at pages 106a through 111a (J.A.) of its opinion, constructed a labyrinthe of inferences and implications to permit the offset. The Court found that §401(a)(5) permitted vested pension benefits to be offset by all types of Social Security benefits, presumably from the phrase "retirement benefits created under State or Federal Law" and the more specific reference to Social Security in §401(a)

(15). At pag 107a (J.A.) of its opinion, the Court concluded that "... Congress gave its *implicit* approval to the practice of permitting ... an offset of Social Security benefits against pension plan benefits." (emphasis added). The Court, relying on the statutory reference to the Social Security Act in §401(a)(15), finds that since Social Security disability benefits flow from the same federal fund as Social Security retirement benefits, are therefore includable as an offset of a "retirement benefit created undr State or Federal Law." The Court infers at page 108a (J.A.) that "the Social Security offset that Congress has approved includes, perforce, an offset against pension benefits for *disability* benefits." (Court's emphasis). The Court has drawn an inference based on a perceived implication.

The Court continues to expand the meaning of "retirement benefits" by reasoning that since Social Security provides "disability benefits" and workers' compensation awards are for "disabilities", the distinction between the two is "meaningless." Therefore workers' compensation awards for "disabilities" are "retirement" benefits, permissably offset against vested retirement pensions. The Court has found an 'implicit' offset of Social Security retirement benefits and inferred the inclusion of Social Security disability benefits. It has confused the generic, plain, ordinary meaning of "disabilities" for a term of art and simplistically ignored the fundamentally distinct natures of retirement pensions, Social Security benefits and workers' compensation awards.

The Court below, well aware that New Jersey's workers' compensation statute is the exclusive means of redress for an employee's work related injuries, reaches a result that effectively denies compensating relief to the employee. Should a retired employee secure a judgment for work related injury, the full amount of such award is offset against the retirement pension.

Legislative history supporting the proposition that Congress *intended* to include workers' compensation awards as a permissable forfeiture against a vested retirement pension is minimal. It is clear that ERISA's exacting requirements to secure qualification of a plan are intended to protect the nonforfeitability of vested pension benefits. That Congress anticipated the offset of benefits from Social Security is evident in §401(a)(15). However, that section is a limitation on the amount of the offset by freezing the level of offset at the earliest of two events. Congress was absolutely specific as to how Social Security should be accounted. Had it intended to include workers' compensation awards, there certainly would have been Congressional discussion on the subject, and possibly, even, a statute specifying to employees, employers, and the fifty states the nature and application of such an offset.

The Court of Appeals permits the offset of workers' compensation awards because it found Treasury Regulation §1.411(a)-4(a) valid. The Court made two serious errors in its analysis, either of which necessitates reversal of its decision and requires invalidation of the Regulation.

The Court erroneously regarded the Regulation as "legislative"—nearly invulnerable to that Court's perspective. Judge Garth amplified his views on the correct characterization of regulations (whether "interpretive" or "legislative") and articulated the standard for judging the validity of such characterized regulations. *Baker* v. *Otis Elevator,* 609 F.2d 686 (3rd Cir. 1979). As to "legislative" regulations he stated "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole." (J.A. 100a).

The quintessential examples of "legislative" regulations occur where Congress *expressly* authorizes an agency to define the terms of a statute and enact the rules for its effectuation. See, e.g., *Baterton* v. *Francis*, 432 U.S. 416 (1977). Regulations not stemming from express, statu-

tory authorization are "interpretive regulations, persuasive to the extent they are logical and consistent and based on the regulating agency's expertise in a particular area. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

The Circuit Court characterized 26 C.F.R. §1.411(a)-4(a) as "legislative", derived from 29 U.S.C. §1202(c), §3002(c) of ERISA. (J.A. 100a). However, this section of ERISA merely prohibited the Department of Labor from prescribing regulations inconsistent with Treasury interpretations of §§410(a), 411 and 412 of the I.R.C. It was clearly not an express grant by Congress of "legislative" authority, but rather, constitutes a grant of "interpretive" regulatory authority. Consequently, 26 C.F.R. §1.411(a)-4(a) cannot bear the great weight placed on it by the Court below.

The second major error in the Court of Appeals reasoning is its conclusion that Regulation §1.411(a)-4(a) validly authorized the offset of workers' compensation. The Court premises its finding on the fact that Regulation §1.411(a)-4(a) was enacted under §411 of the Code, the antiforfeiture provision analogous to §203 of ERISA (29 U.S.C. §1053). As discussed, *supra*, the regulation incorporates the statutory areas contained in §§401(a)(5) and (15) when it separately refers to Social Security benefits and ". . . any other Federal or State law (benefits) . . ."

Upon reading 26 C.F.R. §1.411(a)-4(a), §411 of the Code and §203 of ERISA, it is absolutely clear that neither of the statutes authorizes forfeiture of vested benefits as asserted in the regulation. The regulation purports to authorize reductions for Social Security or "any . . . Federal or State" benefits. But clearly the regulation's authorization of such benefits squarely conflicts with the strict antiforfeiture provisions of I.R.C. §411 and ERISA §203. Treasury regulations are without force if they conflict with the statute. *Service Life Insurance Co.* v. *United States*, 293 F.2d 72 (8th Cir., 1961). A regulation which operates to create a rule out of harmony with the statute is a mere nullity." *Manhatten General Equipment Co.* v. *Commissioner*, 297 U.S. 129 (1936).

In that 26 C.F.R. §1.411(a)-4(a) attempts to expand the antiforfeiture statutes, it is an impermissible amendment of the statutes. A statute cannot be amended by regulation. *Koshland* v. *Helvering,* 298 U.S. 411 (1936). However, this is precisely what the regulation does. The I.R.S., by dropping the word "retirement" from the regulation has eliminated the Congressional intent to carefully narrow the type of benefit, permissibly offset. Although §1.411(a)-4 (a) unmistakeably alludes to 26 U.S.C. §401(a)(5), it fails to remain true to the statute's plain meaning. The regulation has permitted a class of offsets much broader then "retirement benefits created under State or Federal law." Even assuming that §401(a)(5) of the Code, originally enacted prior to ERISA, is the source of some kind of permissible offset not specifically an exception contained in the antiforfeiture provisions, §401(a)(5) does not permit the offset of workers' compensation award as included within the meaning of "retirement benefits created under State or Federal law."

26 C.F.R. §1.411(a)-4(a) does not specifically authorize the offset of workers' compensation awards. Rather, defendant-respondent and the Court below find support for the regulation's allowance of the offset in Revenue Ruling 68-243, 1968-1 CB 157, a ruling that predated ERISA by six years, and was addressed to nondiscrimination issues rather than nonforfeitability. It is important to note that the interests of workers' compensation recipients was not represented in the I.R.S.'s procedures for the issuance of such Rulings.

The precedential value of any Revenue Ruling is dubious at best. Rulings like 68-243 are merely the opinions of a lawyer in the agency and are not intended to create legally binding rights or obligations. *Stubbs, Overbeck & Associates* v. *United States,* 445 F.2d 1142 (5th Cir., 1971).

Defendant-respondent has drawn a negative inference to support its offset, that Congress reenacted Revenue Ruling 68-243 by not specificly rejecting it when ERISA was

passed. It is unreasonable, however, to assume that Congress could account expressly in a statute for every contradictory Ruling. As the Court of Appeals for the Second Circuit stated in *F.W. Woolworth Co.* v. *United States*, 91 F.2d 973 (2nd Cir., 1937); *cert. den.*, 302 U.S. 768 (1938):

> To suppose that Congress must particularly correct each mistaken construction under the penalty of incorporating it into the fabric of the statute appears . . . unwarranted.

The *Buczynski* court states that Congress was aware of 68-243 when enacting §203(a) of ERISA by citing the report of the Conference Committee which states:

> Moreover, the conferences intend that the anti-discrimination rules of present law in areas other than vesting schedule are not to be changed. Thus the present anti-discrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the anti-discrimination rules may be applied with respect to benefit accruals. *3 U.S. Code Cong. & Admin. News*, 5038, 5058 (1974).
>
> This history of IRS practice with respect to workers' compensation offsets, has Congressional preservation of the anti-discrimination rules, suggest that, if anything, Congress approved of workers' compensation offsets. *Buczynski, supra*, at 1248.

It is patently obvious that the reference to the conference report not only fails to show that Congress knew or approved workers' compensation offsets, but with its reference to vesting schedule changes in current pension law, adds further weight to the argument that with the reformation of the vesting and nonforfeitable provisions of ERISA, this offset must be deemed totally and completely invalid.

Initially, 68-243 draws a mysterious distinction between workers' compensation laws which provide an employee's exclusive avenue for recovery for work related injuries and recoveries obtained for the same injuries through traditional tort claim procedures. The Ruling then permits an offset against retirement pensions by workers' compensation awards, but prohibits offset of recoveries obtained at common law, on the basis that an offset of tort damages would allow the employer to pay his own liabilities out of the assets of the pension fund.

This Revenue Ruling demonstrates a profound ignorance of the nature of workers' compensation payments as comprehensive replacement of traditional tort damages which (like tort damages) remain the exclusive liability of the employer. The Internal Revenue Service is apparently unaware that workers' compensation statutes were enacted in lieu of the common law remedy. The force of Revenue Ruling 68-243 "as an aid to the interpretation of the statute is impaired by [this] internal inconsistency." *U.S.* v. *Calamaro,* 354 U.S. 351 at 359, n. 12 (1957).

Congress must be presumed to know and mean what language it uses in its statutes. §401 (a)(5) explicitly states "retirement benefits created under State or Federal laws" thereby excluding all "benefits that are not "retirement" ones which are "created under . . . law". An analysis of what type of "benefit" a worker's compensation award is, demonstrates that it is not a "retirement" benefit.

The New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1, *et seq.,* originates from 1911. The statute was in derogation of the common law right of recovery by a servant against a master for tortious injury sustained through the course of employment. *Sharp* v. *Borough of Vineland,* 1936, 14 N.J. Misc. 256, 183 A.911; affd., 117 N.J.L. 598, 190 A.44 and 118 N.J.L. 567, 6A.2d 386. The traditional common law action was replaced by a statutory scheme that standardized the amount of damages recoverable for a particular injury. The Act was intended to eliminate in-

equities and the cumbersome and vigorous standards of proof needed for a successful claim. *Dudley* v. *Victor Lynn Lines, Inc.*, 32 N.J. 479 (1960).

However, the overall purpose of the Act was to better serve the same social policy evident in the common law right of a servant: compensation to the employee for injury resulting from the domain of the employer, the workplace. As the New Jersey Supreme Court stated in *Renshaw* v. *United States Pipe & Foundry Co.*, 30 N.J. 458 (1959):

> "Liability for workmen's compensation, or the extent thereof, is not based on the impairment or loss of earning power, but rather the loss ensuing from personal injury as it detracts from the former efficiency of the workmen's body or its members in the ordinary pursuits of life."

Today, the Act provides employees' sole avenue for redress of injuries sustained on the job.

The New Jersey Courts have accurately expressed the character of the compensation and it is clearly not one of retirement. Prior to 1911 in New Jersey, the right to sue an employer for workplace injury was recognized at common law, and the personal injury awards were enforceable. The "benefits" stemming from a successful suit were "created" (originally conceived and existent) at common law. In this light, it can be seen that New Jersey workers' compensation awards are not "retirement benefits created under State or Federal law".

The administration of the Act indicates its logical relation to general tort actions. An employee must establish in court that an injury was sustained during the course of employment by the employer claimed against. The employer makes no deduction from an employee's paycheck to forward to a central government fund, nor does the employer contributions to such a fund on the behalf of the employees (as is the case for Social Se-

curity). An employer pays out nothing prior to an adjudication of liability. The burden of such liability is exclusively with the employer and its not shifted to the employee.

There is no minimum age requirement before an employee is eligible to collect workers' compensation, providing an injury was sustained through the employment. Nor is there a minimum period of time an employee must work before recovery can be obtained; the right attaches at the commencement of work. Additionally, compensation is paid for temporary and partial injuries, as well as total, permanent disability. N.J.S.A. 34:15-1 *et seq.*

Active workers as well as retirees are eligible to collect workers' compensation awards and are held to the same standards of compensation. In the case now before the Court, only retirees are effected.

Two other points must also be noted. A retiree who is healthy is in a very different position than a retiree who has sustained an injury from the job. The latter must cope, not just with the depressing limitations of bodily injury, but the medical and other incidental expenses concomitant to the disability. Additionally, workers' compensation awards have secondary purposes in that they monetarily punish employers who maintain deleterious workplaces and consequently stimulate salutary improvements.

Retirement pensions have no relation to whether or not an employee has suffered a disability arising from the work relationship. The pension benefit is a result of a contract, not a statutory action at law (where workers' compensation is grounded). Retirement pensions are wages earned during the course of employment but payable after the completion of the work career. *Inland Steel* v. *NLRB,* 170 F.2d 247 (7th Cir., 1948), *cert. den.* 336 U.S. 960 (1949). The Seventh Circuit, in dealing with the meaning of "wages" as used in the National Labor Relations Act, 29 U.S.C. §141 *et seq.,* stated:

> It surely cannot be seriously disputed but that such a pledge [to pay retirement pensions] on the part of the Company forms a part of the consideration for work performed . . . In this view, the pension thus promised would appear to be as much a part of his "wages" as the money paid him at the time of the rendition of his services . . . 170 F.2d at 253.

That pensions are deferred wages is clearest in relations such as that between the parties in this case: a collectively bargained agreement established the hourly or weekly wage levels and the amount of pension contributions.

This Court has acknowledged the nature and distinctiveness of retirement pensions as deferred income on which retirees are entitled to rely for payment. *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 98 S.Ct. 2716 (1978); *City of Los Angeles Department of Water and Power* v. *Manhart,* 435 U.S. 702, 98 S.Ct. 1370 (1978); *Alabama Power Co.* v. *Davies,* 431 U.S. 581, 97 S.Ct. 2002 (1977).

The pension benefit is predicated on a formula combining the number of years worked for which contributions to the pension fund were made and the amount of the contribution at the time the employee retires, provided the employee has reached a minimum age and worked a minimum number of years. There is neither a minimum age requirement nor a minimum years of service requirement for an employee to be entitled to workers' compensation. As previously discussed, no prior contributions are required in the New Jersey workers' compensation program to provide subsequent benefits. Further, under the workers' compensation program, the employee must prove, in a court of law, all the necessary jurisdictional and substantive aspects of his claim before he is entitled to an award. In contrast, a retiree collects

his pension as a matter of routine company administration directly from the company.

The social policy supporting the concept of retirement pensions is that wages are earned from work performed, but payment for such earnings is deferred by agreement between the parties as a means of guaranteeing income to retirees. Workers' Compensation awards are based on an entirely different policy: injuries are compensable by the party causing them. These distinct policies are recognized at least indirectly, by the Internal Revenue Service. The retirement pension is treated as taxable income when it is paid to the retiree (provided the retiree's total taxable income is sufficiently high enough to be taxed). The compensation award, however, is not taxable income, similar to the tax treatment accorded standard negligence awards. See 26 C.F.R. Section 1.104(a) and (b).

Social Security benefits are only superficially similar to workers' compensation awards. This is essentially due to the fact that two types of Social Security benefits are available from one act of Congress, and both are administered by a single bureaucracy. The Act is clear that different eligibility requirements apply to the different benefits.

Retirement benefits under Social Security are available to one who has worked a requisite number of quarter-years over a specified period of time at a job where contributions to the system were made. Additionally, one must attain a minimum age before benefits are available, and such benefits are only payable upon the completion and acceptance of an application. In most cases, there is no adversary proceeding and benefits are administered directly. Federal regulations govern the various requirements concerning contributions, payments and eligibility. ERISA has placed the Federal government further into the field of pension regulation. In this context, Social Security retirement benefits are somewhat similar to retirement pension benefits.

Social Security disability payments are substantially distinct from workers' compensation awards issued in New Jersey Courts. This is evident from the very different purposes served by each and is reflected in the respective standards for eligibility and manner of administration. These differences are rooted in the separate purposes and goals each attempts to fulfill and cannot be logically or realistically ignored or distored. The Court of Appeals could reject these fundamental differences as "meaningless" only by obliterating the plain meanings of words in a statute.

Due to the contradiction between 26 C.F.R. §1.411(a)-4(a) and the statutory provisions concerning nonforfeitability, and due to the regulation's evident expansion of the statute stemming from the Internal Revenue Service's lack of understanding of the distinct natures of workers' compensation awards and vested retirement pensions, the regulation must be struck down as invalid.

D. The nonforfeitability requirement of ERISA mandates that vested pension benefits cannot be offset by concurrent receipt of worker's compensation irrespective of pension plan provisions.

The respondent contends that if a workers' compensation offset is deemed to be part of a "normal retirement benefit" in an accrued benefit formula pursuant to 29 U.S.C. §1002 (22) (23), then it does not violate §1053 (a)'s prohibition against forfeitures of vested pension benefits. Moreover, they argue that if the forfeiture of that vested benefit is contained in the formula for the calculation of benefits, it does not amount to a forfeiture. Rather, they characterize the offset as merely an "integration" of benefits under the plan and not in any manner regulated by ERISA's vesting and nonforfeitability provisions. To accept such a provision not only would completely ignore the language utilized by Congress in ERISA, but would emasculate Congressional purpose and intent and render ERISA a meaningless piece of legislation.

By this argument, the Plan seeks to ignore vesting and nonforfeitability sections of ERISA and all the precedents established by *Nachman* and the previously described lower court decisions. The GMC Plan position is that despite the clearly recognized rule of nonforfeitability contained in §3 (19) and §203 (a) vested accrued benefits should be subject to contractually imposed additional conditions subsequent to the receipt of such full benefits. It is maintained that the full benefits which are nonforfeitable are only those vested benefits which a plan chooses to provide in the first place. Such a position, of course, completely nullifies the vesting and nonforfeitability sections of ERISA by subjecting supposedly nonforfeitable and unconditional vested benefits to any conceivable plan imposed condition.

Moreover, GMC's incredible assertion that the concept of nonforfeitability is subject to whatever condition that pension plan subsequently imposed, proves altogether too much, for it would permit a participant's retirement benefit to be forfeited or reduced for countless other reasons which Congress clearly deemed impermissible and inconsistent with the notion of nonforfeitability. In fact, such reasoning carried to extreme would permit forfeitures based upon illegal "bad boy" clauses and would allow offsets of items such as state lottery or racetrack winnings or veterans' benefits "under the plan". The plain fact of the matter is that ERISA prohibits the imposition of any conditions precedent or subsequent to the receipt of vested pension benefits.

Reduced to its naked terms, the respondent's argument is that it may impose any conditions upon the receipt of vested benefits so long as the condition is somehow included in the benefit calculation *under the plan.* It is a simple matter to see through that type of simplistic reasoning. See *Utility Workers,* supra and *Stong,* supra. It clearly is a distinction without a difference; the plan is merely saying that if it puts the cart before the horse rather than the horse before the cart, there is no violation

ERISA. This also seems to be the bottom line reasoning of the *Buczynski* Court below. This line of reasoning presumes Congress to have enacted toothless legislation, the requirements of which can be evaded by the mere insertion of an offset provision in the plan. The clear statutory language of ERISA evidences the absurdity of this "under the plan" argument. Though ERISA may not set forth a minimum amount of benefits, there is no vested right to any benefits if the plan can subsequently divest an employee of his already accrued vested retirement.

Clearly, it was not the intent of Congress to allow such semantical differences to affect the employees' vested rights. Congress intended to protect employees from the previous economic realities in which employees lost pension benefits after long years of service with an employer. The GMC Plan offset provision is applied subsequent to the time that the petititoners began receiving vested pension benefits pursuant to §203 (a)(2) of ERISA and subsequent to the calculation of the benefits under the plan.[3] There-

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[3] Respondent's argument that the offset is a part of the calculations of benefits rather than a forfeiture of vested benefits must fall under §105 (a) and §209 (a) of ERISA. The former section, 29 U.S.C. §1025 (a) requires the plan administrator to supply a participant (on request) a written statement indicated:

> (1) the total benefit accrued, and;
> (2) the nonforfeitable pension benefits which have accrued on the earliest date on which benefits will become nonforfeitable.

§209 (a), 29 U.S.C. §1059 (a), a record keeping and reporting provision, requires a report "sufficient to inform the employee of his accrued benefit under the plan and the percentage of such benefits which are nonforfeitable under the plan".

These provisions, requiring reporting of the amount of accrued and nonforfeitable retirement benefits at any given time, dispose of respondent's claim that somehow a post-retirement compensation award is part of the calculation of benefits. Obviously, the retirement benefits have vested and become nonforfeitable (in a calculable amount) prior to that time. Clearly the GM offset constitutes not a benefit calculation, but rather a forfeiture of vested (nonforfeitable) retirement pension benefits and must fall under ERISA's strict requirements.

fore, viewed in this sequence, there is a clear condition which causes a forfeiture of vested pension benefits. This condition is the subsequent forbearance of filing workers' compensation claims for work related injuries.

The position of respondent and the Court below completely eviscerates ERISA by allowing a pension plan to reduce a participant's already vested benefit by the amount of payment later received from any collateral source for any purpose. Since Congress did not intend employees' efforts during their employment to provide income for their retirement to be nullified by such offset provisions, the workers' compensation offset must be invalidated. Regardless of when the forfeiture occurs, it is a forfeiture in fact and a total loss of vested nonforfeitable pension benefits. Calling it integration does not alter this fact.

This identical argument was raised in *Utility Workers.* The District Court there held:

> "Having determined that the Plan treats the workmen's compensation offset as an integral part of the normal retirement benefit, the question arises whether the offset violates the nonforfeitability provisions of 29 U.S.C. §1053. It is not enough merely to determine that the Plan defines the normal retirement benefit as a certain sum, less any offset, and then conclude that the Plan beneficiary has received all he is entitled to. It is necessary to inquire into the nature of the offset to see if it violates the Act
>
> . . .
>
> To hold that any forfeiture or suspension of benefits is permissible as long as it is sanctioned by the plan is to turn the *entire statutory scheme upon its head.*" 453 F.Supp. at 452. (Emphasis added.)

The District Court in *Stong,* likewise rejected the identical argument holding:

> "The defendants' position boils down to this: The workers' compensation reduction authorized by §3.11

> is integrated by §3.1 into the formula for calculating the 'normal retirement benefit' and 'accrued benefit' 'under the plan' within the meaning of 29 U.S.C. §1002(22), (23), and it does not therefore constitute a forfeiture of benefits to which an employee has an unconditional right. One court's response to this contention was: 'To hold that any forfeiture or suspension of benefits is permissible as long as it is sanctioned by the plan is to turn the *entire statutory scheme upon its head . . .' Utility Workers,* supra, at 452". *Stong, supra.*

Subsequent to the *Stong* Court's decision on June 18, 1979, the Defendant Intervenor, the Secretary of the Treasury, moved to reconsider that Decision and Order and on December 10, 1979, Judge Gordon, in denying the Motion to Reconsider, held:

> The Secretary contends that the nonforfeiture requirement applies only after the "normal retirement benefit" has been calculated "under the plan" and that the worker's compensation offset provision is merely part of the formula for calculating such normal retirement benefit. Therefore, no forfeiture of normal retirement benefits is effected by reducing a worker's pension in proportion to any worker's compensation benefits he may recover.
>
> As I suggested previously, 472 F.Sup. at 1092, acceptance of this argument would open a Pandora's box which Congress intended to nail shut by defining "nonforfeitable" as narrowly and precisely as it did in 29 U.S.C. §1002(19). The critical fallacy in the Secretary's reasoning is this: The challenged offset is *not* part of the formula for calculating the normal retirement benefit; rather, the offset imposes a condition subsequent on a worker's right to receive his normal retirement benefit. It is this placing of a

condition (the recovery of workers' compensation benefits) on the right to receive otherwise fully due retirement benefits that brings the offset provision squarely within the forfeiture definition, making the offset a clear violation of the act.

Finally and perhaps most cruelly, is the fact that the petitioners here (injured retirees) will collect no pension benefits during the period of offset. This would clearly constitute a total loss. Surely the previously earned pensions are no more available to them because the respondent calls its reduction an integration of benefits. The simple fact of the matter is that the Plan provision operates to suspend the employee's pension benefit. Moreover, increases in levels of Social Security cannot be offset. §1054(b) of ERISA and §401(a)(15) of the Internal Revenue Code. Under GMC's contention and plan, there is no such level when workers' compensation payments will not continue to be forfeited. Certainly no qualified pension plan entirely suspends an employee's pension benefit for the period of time that he is entitled to receive Social Security. This fact alone demonstrates that the offset euphemistically characterized by defendants as an "integration", constitutes nothing less than a total forfeiture of vested pension benefits and the normal retirement income which Congress intended to guarantee employees.

As discussed in part I-C of this brief, *supra*, respondent has attempted to set the statutory force of ERISA on its head and to relegate the unambiguous language of ERISA to a back seat by arguing that workers' compensation offsets against retirement pensions have previously been permitted.[4] More unfortunate is that fact that the Third

[4] In addition to arguments favoring the offset based on 26 U.S.C. §401 (a)(5), the tax code anti-discrimination provision and the pre-ERISA Revenue Ruling 68-243, supra, it has been suggested that . . . the case of *Renshaw* v. *U.S. Pipe and Foundry Co.*, 30

(Footnote continued on following page)

Circuit accepted respondent's argument in this matter.

Such an attempt to subvert that policy of ERISA is hopefully doomed to failure, because the passage of ERISA did not constitute a continuation of previous pension plans, but rather signified a major shift in policy. Greenough and King, *Pension Plans and Public Policy,* supra. Pre-ERISA law was formulated from the standpoint of quali-

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(Footnote continued from preceding page)

N.J. 458, 153 A.2d 673 (1959) supports the proposition that the previous policy in this country was to allow workers' compensation offsets against pension benefits. However, New Jersey statutory law as well as other existing case law clearly refutes this argument. For example, the enactment of Chapter 156 of the Laws of 1977, amending N.J.S.A. 34:15-1 *et seq.*, shows strong public policy in opposition to offsets of compensation against retirement pensions and provides that:

> "The right of compensation granted by this chapter [the New Jersey Workers' Compensation Act] may be set off against disability pension benefits or payments, but shall not be set off against employees' retirement pension benefits or payments."

Moreover, the *Renshaw* Court, as discussed supra, recognized that workers' compensation payments were made, not for a loss of earning power, but for an injury to the body. Clearly, this can also be cited as strong indication that the *Renshaw* Court noted the difference between Social Security retirement benefits and workers' compensation, though it felt constrained to allow such a pension deduction.

Cases in opposition to the decision in *Renshaw* include *City of Lincoln* v. *Steffensmeyer,* 279 N.W. 272 (1938). In *Lincoln,* the Court was determining whether a worker could receive workers' compensation and pensions. The Court determined that such recovery did not allow him double protection or double compensation for the same injury. The *Lincoln* Court held that a pension is not synonymous with compensation but will not operate to bar his right to a pension. In addition, in *Lumsden* v. *Despatch Shops,* 171 N.Y.S.2d 189 (1958), the New York Court maintained that a retiree could receive a pension as well as compensation if the disability arose from occupational causes.

fication of the pension plan for favorable tax treatment. ERISA was enacted to provide, *inter alia,* standards for vesting of participant's benefits, funding of pension plan liabilities and fiduciary duties of plan administrators. § 2 of ERISA, 29 U.S.C. §1001. Therefore, decisions and interpretations of the offset area, prior to ERISA, are of virtually no value in interpreting the post-ERISA state of the law.

Finally, respondent has argued that another agency charged with the responsibility of interpreting ERISA allows workers' compensation offsets. GMC cites regulation §2605.2 of the Pension Benefit Guarantee Corporation (an agency established under ERISA) claiming said regulation (which states that a pension benefit can be combined with Social Security or workers' compensation if they "provide a substantially level income to the recipient") should be accorded great deference. This argument, however, suffers from the same lack of statutory support that makes Treas. Reg. 1.411 (a)-4(a) a nullity. This PBGC regulation has also been rejected by Justice Stewart in *Nachman* as contrary to ERISA.

In addition, PBGC regulations only apply to plan terminations under Title IV of ERISA (29 U.S.C. §1302) and do not relate to Title I provisions such as §203. Therefore, no administrative practice under any Internal Revenue Code section is relevant to or can supercede the nonforfeitable vested rights of pensioners guaranteed by the admirably clear and unambiguous language of ERISA's §§3 (19) and 203(a), 29 U.S.C. §§1002(19) and 1053.

II. Chapter 156 of the New Jersey Laws of 1977, amending N.J.S.A. 34:15-29 (prohibiting offsets of workers' compensation awards against retirement pensions) is a proper exercise of state power, not pre-empted by E.R.I.S.A., 29 U.S.C. §1144(a).

Chapter 156 of the New Jersey Law of 1977 became effective on July 14, 1977 as an amendment to the New Jersey Workers' Compensation Act. Said law specifically amended N.J.S.A. 34:15-29, by providing:

> "The right of compensation granted by this Chapter may be set off against disability pension benefits or payments, but shall not be set off against employees' retirement pension benefits or payments."

The respondents herein and the U.S. Court of Appeals for the Third Circuit, in its opinion below, offer a very simplistic argument to support their claim of pre-emption of this law. They begin with Section 514(a) of ERISA, 29 U.S.C. 1144(a), which provides:

> "Except as provided in Subsection (b) of this Section [Section 514(b), exempting causes of action which arose prior to January 1, 1975, is not relevant in this action] the provisions of this Title and Title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 4 (a) and not exempt under Section 4 (b). This section shall take effect on January 1, 1975".

Continuing with the fact that the General Motors Hourly Rate Employees Pension Plan is an employee benefit plan under Section 4 (a), 29 U.S.C. 1003 (a), not exempt under Section 4 (b), 29 U.S.C. 1003 (b), which has never been disputed, the court below and the respondents focus on the New Jersey law. Claiming that said state law relates to employee benefit plans brings the argument to its syllogistic conclusion that the New Jersey law is pre-empted by ERISA.

The Third Circuit and the respondents have ignored the fact that Chapter 156 was enacted as an amendment to the New Jersey Workers' Compensation Act. With one exception, ERISA makes no reference to workers' compensation. It is difficult to fathom a federal statute such as ERISA, purporting to pre-empt state law in an area not even regulated by the federal law. Such an interpretation surely goes beyond broad pre-emption of the pension field to the point of infringing upon the state police power.

ERISA does make mention of workers' compensation at Section 4 (b) (3), 29 U.S.C. 1003 (b) (3), wherein a plan "maintained solely for the purpose of complying with applicable workmen's compensation laws . . ." is exempted from the provisions of Title I of ERISA. Admittedly, the General Motors Pension Plan is not exempt under this provision. However, the inclusion of a workers' compensation exemption, within the body of ERISA, shows that Congress recognized that workers' compensation, being within the traditional sphere of state regulation, was not to be interferred with by the enactment of ERISA.

This Court has also recognized that workers' compensation falls within the state police power. In *De Canas* v. *Bica*, 424 U.S. 351 (1976), this Honorable Court held:

> "State possesses broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workers' compensation laws are only a few examples."

In enacting Chapter 156 of the laws of 1977 amending N.J.S.A. 34:15-29, the State of New Jersey was merely exercising that state police power to regulate the employment relationship and protect workers within the state. Passage of this law was another step in ongoing regulation of the employment relationship, which began with

the passage of the first workers' compensation law in New Jersey in 1911. As discussed, *supra,* this exercise of the state police power, i.e., regulation of the employment relationship, has resulted in a mandatory system of compensation in New Jersey, whereby the sole redress for work-related injury is a workers' compensation action, *Renshaw* v. *U.S. Pipe and Foundry Co., supra; Dudley* v. *Victor Lynn Lines, supra.* If the Third Circuit decision in the case at bar is permitted to stand, the rights of states to regulate the employment relationship and to protect workers within the state will be rendered meaningless. States will have no ability to ensure that workers are actually compensated for those injuries deemed by the states to be compensable.

Chapter 156 of the New Jersey Laws of 1977 surely constitutes a proper exercise of state police power. It evidences an effort by the State to require an employer to pay that compensation to a worker which a state tribunal has awarded in the form of a judgment. The offset provision in Article IV, Section 2 of the General Motors Pension Plan, whereby the compensation award is offset, dollar for dollar, against the employee's retirement pension, leaves the injured employee in the same economic position as the uninjured employee and in the same position as said injured employee before he received a compensation award. The New Jersey Law in question was enacted to avoid this result; to require that the injured employee actually received the amount of compensation awarded him. If a state has the power to regulate the employment relationship, to protect workers within its borders and to set up a system of compensation for work-related injuries, that state must surely have the power to require an employer to pay a compensation award for which said employer has been held liable. Unfortunately, this is not true under the Third Circuit decision. In finding laws such as the instant New Jersey Statute pre-

empted under Section 514 of ERISA, 29 U.S.C. 1144, the court below enables employers to offset compensation awards against retirement pensions, rendering the compensation awards meaningless, while leaving the states powerless to enforce the workers' compensation awards. For the petitioners herein, the right to be compensated for work-related injuries will have been reduced to a hollow shell. State authority, under the police power ,to regulate the employment relationship and protect workers in the state, will have become a sham. ERISA, instead of protecting employee's pension rights, will serve to deprive employees of much traditional state protection, while providing nothing in the place of such protections. There is no language, expressed or implied, anywhere within the statutory scheme of ERISA or its legislative history showing such intent on the part of Congress. Petitioners submit it is inconceivable that Congress, under the guise of protecting employees' retirement benefits, could have pre-empted protections to workers, carefully fashioned by states such as New Jersey over long periods of time.

As the foregoing discussion respectfully shows and as the United States District Court for the District of New Jersey found:

> "However, the New Jersey statute at issue here is in no way concerned with pension plans qua pension plans. On the contrary, the New Jersey statute is solely concerned with protecting the employee's right to workers' compensation disability benefits. This is clear from the language of the statute itself." (Appendix at 53).

This is not a case where a state has attempted to legislate in the face of Congressional pre-emption. Congress, via Section 514 of ERISA, 29 U.S.C. 1144, has pre-empted state regulation of pensions. Congress has not shown any intent to pre-empt state regulation in other areas, e.g., workers' compensation, which may have the most

marginal effect on pensions. Absent a clear Congressional intent to pre-empt (in an area where states have traditionally exercised power) pre-emption should not be found. *Jones* v. *Rath Packing Co.*, 430 U.S. 514 (1977). As Congress has shown no intent to pre-empt the area of workers' compensation, pre-emption should not be found. In a case involving the National Labor Relations Act, *Farmer* v. *Carpenters,* 430 U.S. 290 (1977), this Honorable Court said:

> "Our cases indicate, however, that inflexible application of the [pre-emption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."

The State of New Jersey most definitely has a strong interest in protecting workers within its borders and ensuring that those workers are compensated for injuries suffered in the course of employment. Since that state's interest does not threaten to interfere with federal regulation of private pension plans, there is no reason for the New Jersey statute to be pre-empted. Recognizing Chapter 156 of the New Jersey Laws of 1977 as a proper exercise of state police power would also be consistent with this Court's decision in *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, (1963), holding that pre-emption should not be found absent:

> ". . . persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained."

Neither persuasive reason is present here. Congress has not unmistakably ordained pre-emption of state workers' compensation laws, and the nature of the subject matter, i.e., compensation for employment-related injury has al-

ways been regulated by the states. In such a situation, the statutory schemes should be reconciled with one another. *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973).

The *Buczynski* court, in holding the New Jersey law pre-empted, found that Chapter 156 of the Laws of 1977 relates to pension plans. The difficulty with that conclusion is self-evident. Under the Third Circuit decision, payments received by retired workers, pursuant to state workers' compensation laws, are offset against retirement pensions. The amount of the offset (which equals the amount of the compenstion payment) is determined by the state compensation law. Therefore, the state workers' compensation law, in effect, determines the amount of the offset against the retirement pension which pension is subject to ERISA. The entire state workers' compensation law thus "relates to pension plans' every bit as much as the provision of that law prohibiting offsets "relates to pension plans". Under the Third Circuit rationale, all state workers' compensation laws should be pre-empted in their entirety, because they relate to pension plans. The fact that such a result is untenable further shows that preemption under §514 of ERISA, 29 U.S.C. 1144, cannot apply to state laws, regulating areas other than private pension plans, which tangentially relate to such plans.

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, while presenting the Conference Committee Report on ERISA, referred to pre-emption as ". . . eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." 120 Cong. Rec. S. 15,737 (1974). Of course, a finding that the New Jersey law in question is invalid will have precisely the opposite result. Since each state has its own workers' compensation statute, there are fifty different systems of compensation presently in effect. The petitioners herein would probably have recovered different amounts of workers' compensation had they been employed

in other states. Their injuries might have resulted in higher awards in other states. Again, it is the amount of the workers' compensation award which determines the amount of the retirement pension offset. Therefore, General Motors retirees, from different states, will experience different pension offsets. Such a situation presents a far cry from the uniformity which pre-emption was supposed to guarantee. If Chapter 156 of the New Jersey Laws of 1977 is found to be a valid exercise of the state police power, not pre-empted by ERISA, General Motors retirees form New Jersey will all receive their retirement pensions in full. Only when offsets of compensation against retirement pensions are prohibited nationwide, will private pension plans subject to ERISA be free from the vagaries of conflicting and inconsistent state laws.

Case law in another area of traditional state regulation, namely enforcement of alimony and child support arrearages, exhibits that ERISA has not and should not be construed so as to pre-empt state laws bearing only a tangential relationship to the purpose of the federal statute. In *American Telephone and Telegraph Co.* v. *Merry,* 592 F.2d 118 (2nd Cir., 1979), the U.S. Court of Appeals for the Second Circuit upheld a state court garnishment of pension benfits against the pre-emption provision of ERISA, 29 U.S.C. 1144. In rejecting the argument that the garnishment order, enforcing alimony and support obligations, is pre-empted, the court stated:

> "Such a literal construction, however, would necessarily lead to the unreasonable conclusion that Congress intended to pre-empt even those state laws that only in the most remote and peripheral manner touch on pension plans."

In rejecting the pre-emption argument, the Court referred to "fundamental principles of stautory interpretation" whereby:

> "Courts have presumed that the basic police powers of States, particularly the regulation of domestic relations, are not suspended by federal legislation unless that was the clear and manifest purpose of Congress." *See also, Cody* v. *Riecker,* 594 F.2d 314 (2nd Cir., 1979) and *Biles* v. *Biles,* 163 N.J. Super. 49 (Ch. Div., 1978). 592 F.2d 118.

As in the *Merry* case, *supra,* Chapter 156 of the New Jersey laws of 1977 touches on pension plans only in the most remote and peripheral manner. Furthermore, it is in an area of the basic police powers of States, i.e. workers' compensation, which should not be superseded by federal laws, unless it was the clear and manifest purpose of Congress to pre-empt that area of State law. Since Congress has shown no such intent to pre-empt state workers' compensation laws, the New Jersey statute in question is not pre-empted under Section 514 of ERISA, 29 U.S.C. 1144.

The New Jersey law constitutes a proper exercise of state police power, in an area traditionally reserved to the states. It is, therefore, not pre-empted by ERISA. As a valid law, the New Jersey statute, as applied through the "unless prohibited by law" clause in Article IV, Section 2 of the General Motors Pension Plan, serves to prohibit respondent's offsetting of workers' compensation awards against the petitioners' retirement pensions.

CONCLUSION

For all of the reasons set forth above, the judgment (issued in lieu of a formal mandate) of the United States Court of Appeals of March 27, 1980, should be reversed, and the Amended Order issued by the United States District Court, District of New Jersey, on April 5, 1979, should be reinstated.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

Statutes and Regulations

26 U.S.C. §401(a)(5)

(a) Requirements for Qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section.

> (5) A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b) (without regard to paragraph (1)(A) thereof) merely because it excludes employees the whole of whose remuneration constitutes "wages" under section 3121(a)(1) (relating to the Federal Insurance Contributions Act) or merely because it is limited to salaried or clerical employees. Neither shall a plan be considered discriminatory within the meaning of such provisions merely because the contributions or benefits of or on behalf of the employess under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, or merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from "wages" by section 3121(a)(1) differ from the contributions or benefits based on employee's remuneration not so excluded, or differ because of *any retirement benefits created under State of Federal law.* For purposes of this paragraph and paragraph (10), the total compensation of an individual who is an employee within the meaning of subsection (c)(1) means such individual's earned income (as defined in subsection (c)

(2)), and the basic or regular rate of compensation of such an individual shall be determined, under regulations prescribed by the Secretary, with respect to that portion of his earned income which bears the same ratio to his earned income as the basic or regular compensation of the employees under the plan bears to the total compensation of such employees. For purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the amount of contributions on behalf of the employees allowed as a deduction under section 404 for the taxable year with respect to such plans, taken together, bears a uniform relationship to the total compensation or the basic or regular rate of compensation, of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate. For the purposes of determining whether two or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan, if the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take into account of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates. For purposes of determining whether one or more plans of an employer satisfy the requirements of paragraph (4) and of section 410(b), an employer may take into account all simplified employee pensions to which only the employer contributes. (emphasis added)

Statutes and Regulations

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

29 U.S.C. §1053(a)

§ 1053. Minimum vesting standards

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated

from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the

participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

> (i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from em-

ployer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount with-

drawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross Reference.—

For nonforfeitably[1] where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

29 U.S.C. §1144(a)

SUPERSEDURE; EFFECTIVE DATE

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Statutes and Regulations

26 C.F.R. §1.411(a)-4(a)

(a) Nonforfeitability. Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right, is a forfeitable right at that time. Certain adjustments to plan benefits, such as adjustment in excess of reasonable actuarial reductions, can result in rights being forfeitable. Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse towards satisfaction of his nonforfeitable benefits from other than the plan assets for the Pension Benefit Guaranty Corporation. *Furthermore nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.* To the extent that rights are not required to be nonforfeitable to satisfy the minimum vesting standards, or the nondscrimination requirements of section 401(a)(4), they may be forfeited without regard to the limitations on forfeitability required by this section. The right of an employee to re-

purchase his accrued benefit, for example under section 411(a)(3)(D), is an example of a right which is required to satisfy such standards. Accordingly, such a right is subject to the limitations on forfeitability. Rights which are required to be prospectively nonforfeitable under the vesting standards are nonforfeitable and may not be forfeited until it is determined that such rights are, in fact, in excess of the vesting standards. Thus, employees have a right to vest in the accrued benefits if they continue in employment of employers maintaining the plan unless a forfeitable event recognized by section 411 occurs. For example, if a plan covered employees in Division A for Corporation X under a plan utilizing a 10-year-100 percent vesting schedule, the plan could not forfeit employees' rights on account of their moving to service in Division B of Corporation X prior to completion of 10 years of service even though employees are not vested at that time. (emphasis added)

N.J.S.A. 34:15-29. Compensation preferential lien; claim not assignable; set offs

The right of compensation granted by this chapter shall have the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages for labor. Claims or payments due under this chapter shall not be assignable, and shall be exempt from all claims of creditors and from levy, execution or attachment. The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments. Amended by L.1977, c.156, §1, eff. July 14, 1977.

No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT

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PETITION FOR CERTIORARI FILED AUGUST 8, 1980

CERTIORARI GRANTED NOVEMBER 3, 1980

Questions Presented

1. Does a defined pension plan that integrates plan benefits with statutory workers' compensation benefits by reducing the one by the other violate §203(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1053(a)?

2. Is N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the New Jersey laws of 1977, which would prohibit integration of workers' compensation benefits with normal retirement benefits, preempted by ERISA under the Supremacy Clause and §514(a) of ERISA, 29 U.S.C. §1144 (a), as it applies to a pension plan subject to ERISA?

Parties to the Proceeding

The parties to the proceeding are set forth at page ii of the Brief of Petitioners, except that the correct name of the respondent is General Motors Corporation.*

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* Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of respondent General Motors Corporation: Colmotores, Bogota, Columbia; General Motors Iran Limited, Tehran, Iran; Isuzu Motors Limited, Tokyo, Japan; GM Allison Japan Limited, Tokyo, Japan; General Motors Kenya Limited, Nairobi, Kenya; Saehan Motor Company, Ltd., Seoul, Korea; General Motors Pilipinas, Inc., Manila, Philippines; Saudi American Machinery Maintenance Company, Ltd., Jeddah, Saudi Arabia; and Industria Delova Automobile, Kikinda, Yugoslavia.

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No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF RESPONDENT

Statement of the Case

Petitioners Henry Buczynski and Alex Borusovic were hourly employees of respondent General Motors Corporation (hereinafter referred to as "GM") at its Clark, New Jersey, Plant and participants in the General Motors Hourly-Rate Employes Pension Plan (hereinafter referred to as the "GM Pension Plan"), retiring thereunder on January 1, 1972 and March 31, 1973, respectively. On June 25, 1976 and July 2, 1976, respectively, petitioners filed Claim Petitions for Workers' Compensation Benefits, receiving Judgments thereon against GM on April 7, 1977 and February 11, 1977, respectively, in the sums of $2,500 and $2,300. On or about June 22, 1977, both petitioners received an Authorization of Adjusted Monthly Benefits from GM providing for deductions commencing August 1, 1977 from their respective pension benefits under the GM Pension Plan. (J.A.9a-12a)

Such deductions were then and are still authorized under the provisions of Article IV, Section 2 of the GM Pension Plan, as set forth in Exhibit A-1 to the Agreement between GM and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter referred to as the "Union"), dated November 19, 1973, as modified November 22, 1976, which provides that:

> "Section 2. Deductions for Workmen's Compensation
>
> In determining the monthly benefits payable under this Plan, a deduction shall be made unless prohibited by law, equivalent to all or any part of Workmen's Compensation (including compromise or redemption settlements) payable to such employee by reason of any law of the United States, or any political subdivision thereof, which has been or shall be enacted, provided that such deductions shall be to the extent that such Workmen's Compensation has been provided by premiums, taxes or other payments paid by or at the expense of the Corporation, except that no deduction shall be made for the following:

> (a) Workmen's Compensation payments specifically allocated for hospitalization or medical expense, fixed statutory payments for the loss of any bodily member, or 100% loss of use of any bodily member, or payments for loss of industrial vision.
>
> (b) Compromise or redemption settlements payable prior to the date monthly pension benefits first become payable.
>
> (c) Workmen's Compensation payments paid under a claim filed not later than two years after the breaking of seniority." (J.A.31a)

Substantially identical provisions were in effect in the predecessor GM Pension Plans constituting Exhibit A-1 to the Agreements between GM and the Union dated November 11, 1970 and November 19, 1973 (J.A.28a-30a).

On August 5, 1977, petitioners filed a complaint in the Superior Court of New Jersey, Chancery Division, Union County, on behalf of themselves and "all other retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, similarly situated" (J.A.8a-15a) alleging that Article IV, Section 2 of the GM Pension Plan violates N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the Laws of 1977 of the State of New Jersey (hereinafter sometimes referred to as "Chapter 156"), which provides that:

> "The right of compensation granted by this chapter [the New Jersey Workers' Compensation Law] may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments."

The action was removed to the United States District Court for the District of New Jersey on August 9, 1977 (J.A.18a-20a).

On December 7, 1977 and May 10, 1978, the parties filed stipulations of facts (J.A.42a-51a). On August 9, 1978, an Order Certifying Class Action, Etc. was entered by consent of the parties (J.A.52a-53a).

On August 24, 1978, the district court issued a memorandum opinion holding that Article IV, Section 2 of the

GM Pension Plan is unlawful under §203(a) of the Employee Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C. §1053(a), and N.J. Stat. Ann. 34:15-29, as amended by Chapter 156, and that such state statute is not preempted by ERISA (J.A. 54a-69a). At the instance of the district court, GM, on September 29, 1978, moved for reconsideration. On December 20, 1978, the district court issued an opinion (J.A. 70a-79a) and order (J.A.80a) adhering to the previous decision embodied in its opinion of August 24, 1978.

By order entered April 3, 1979, the district court enjoined GM "from making any deductions from retirement pensions payable to the plaintiffs and class members, other than benefits payable by reason of disability, pursuant to Article IV, section 2" of the GM Pension Plan, and directed GM to pay over to them the amount of deductions made from their basic pension benefits payable as a result of having reached normal retirement age, with interest, staying the judgment pending appeal (J.A.86a-87a).

On April 12, 1979, GM timely filed a notice of appeal from such order to the United States Court of Appeals for the Third Circuit (J.A.88a). On January 8, 1980, oral argument was held therein and in *Joseph Alessi, et al.* v. *Raybestos-Manhattan, Inc., et al.*, No. 79-1943 herein. On February 15, 1980, the Third Circuit issued a single opinion in both appeals (J.A.89a-118a) and a judgment in lieu of mandate (J.A.119a-21a) vacating the judgments of the district court in both causes and remanding the causes to the district court for entry of judgments for the defendants in each cause.

On August 8, 1980, petitioners filed a petition for writ of certiorari herein, which writ was granted November 3, 1980 and the cause consolidated with the appeal of the plaintiffs-appellants in *Alessi*, in which this Court, on the same date, noted probable jurisdiction.

Summary of Argument

I.

The language and legislative history of §203(a) of ERISA, 29 U.S.C. §1053(a), demonstrate that its requirement of nonforfeitability of an employee's right to his normal retirement benefit upon the attainment of normal retirement age does not preclude or even apply to the integration of statutory benefits, including state workers' compensation benefits, as is provided in Article IV, Section 2 of the GM Pension Plan. Such integration was approved, prior to ERISA, under long-standing administrative construction of §401(a)(5) of the Internal Revenue Code of 1954, as amended (hereinafter referred to as the "Code"), 26 U.S.C. §401(a)(5), which was reenacted, without relevant amendment, as part of ERISA. This administrative construction was reaffirmed post-ERISA and is consistent with 26 C.F.R. §1.411(a)-4(a) (1980), a regulation adopted by the Secretary of the Treasury pursuant to an express grant of authority in §3002(c) of ERISA, 29 U.S.C. §1202(c). It is, moreover, fully consistent with the principle of nonduplication of private pension plan benefits and nonplan benefits both antedating and postdating ERISA. Deductions pursuant to Article IV, Section 2 of the GM Pension Plan, therefore, do not constitute forfeitures in violation of §203(a) of ERISA and are entirely lawful thereunder.

II.

Congress has unmistakably ordained in §514(a) of ERISA, 29 U.S.C. §1144(a), as its legislative history clearly shows, that the principle of federal preemption expressed therein apply in its broadest sense to foreclose any state law relating to ERISA-covered employee benefit plans such as to the GM Pension Plan. N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the Laws of 1977 of the State of New Jersey, directly "relates to" and affects the GM Pension Plan and, therefore, is preempted by ERISA insofar as it applies to the GM Pension Plan.

ARGUMENT

I.

The workers' compensation integration provision in the GM Pension Plan is lawful under §203(a) of ERISA.

Petitioners premise their contention that Section 2 of Article IV of the GM Pension Plan is unlawful under ERISA upon §203(a) thereof, 29 U.S.C. §1053(a),[1] which provides, *inter alia,* that every pension plan subject to Title I of ERISA (as the GM Pension Plan is) "shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection."[2] ERISA §3(19), 29 U.S.C. §1002(19), defines "nonforfeitable" as meaning "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

---

[1] Pursuant to ERISA §211(b)(2), 29 U.S.C. §1061(b)(2), ERISA §203(a) became applicable to the GM Pension Plan October 1, 1976, its first plan year beginning on or after January 1, 1976, but is inapplicable to forfeitures occurring thereafter with respect to individuals who retired before that effective date. *E.g., Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752, 755 (7th Cir. 1979); *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation,* Civ. No. 79-73728 (E.D. Mich. Dec. 11, 1980); *Keller* v. *Graphic Systems of Akron Inc., Employees Profitsharing Plan,* 422 F.Supp. 1005, 1007-8 (N.D. Ohio 1976); Treas. Reg. 26 C.F.R. §1.411(a)-2(f) (1980).

[2] Subsection (1) of §203(a) relates to plans providing for employee contributions. The GM Pension Plan is not such a plan. Subsection (2) of §203(a) sets forth three basic alternative vesting schedules leading toward the acquisition by an employee of "a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions." The extent to which petitioners have met this schedule is not in issue; that the GM Pension Plan complies therewith is conceded by petitioners (Brief of Petitioners 9).

Subsection (3) of §203(a) enumerates four types of conditions which will not be deemed to render a right to an accrued benefit derived from employer contributions forfeitable. None of these applies here.

Petitioners' argument is beguilingly simple. It is, first, that §203(a) of ERISA prohibits all forfeitures unless excepted by §203(a)(3); second, that the integration of workers' compensation benefits and pension plan benefits is a forfeiture not excepted by §203(a)(3); and third, that a pension plan provision authorizing such integration is, therefore, unlawful under §203(a).

As the Third Circuit recognized below, it is immediately apparent that petitioners' entire reasoning depends upon one critical premise: that workers' compensation benefit integration constitutes a forfeiture within the meaning of §§3(19) and 203(a) of ERISA. The Third Circuit correctly found this premise invalid under the literal language of ERISA, read in light of its legislative history and antecedents, and its authoritative construction by the agency charged with its interpretation, enforcement, and rulemaking functions. The failure of that premise necessarily brings down with it the entire structure of petitioners' argument, and the Third Circuit so held.

Since the decision of the Third Circuit below, two members of a panel of the Sixth Circuit, in *Utility Workers Union* v. *Consumers Power Co.*, —— F.2d ——, No. 78-1402 (6th Cir. Jan. 6, 1981), *aff'g* 453 F.2d 447 (E.D. Mich. 1978), *petition for reconsideration en banc pending*, reached the opposite result,[3] without, however, addressing or even referring to the reasoning of the Third Circuit, on which the third member of the panel based his

[3] Quite to the contrary were the prior decisions of two other judges of the same district court that decided *Utility Workers, Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. Jan. 10, 1978), and *Bordine* v. *Evans Products Co.*, 453 F.Supp. 19 (E.D. Mich. 1978), holding workers' compensation offsets valid.

(Footnote continued on following page)

dissenting opinion.[4] As will be demonstrated herein, the reasoning of the majority in *Utility Workers* is based upon several erroneous assumptions as to the structure and legislative history of the relevant provisions of ERISA that led them to a result totally at odds with the express language and intent of Congress.

A. The express statutory language defeats petitioners' contention that ERISA §203 precludes or affects workers' compensation benefit integration in the determination of the benefit under the plan.

The obvious starting point in the construction of any statute is, of course, its literal language and expressed intent. Petitioners' argument fails at this most basic level. It is necessary, in the first instance, to determine that to which the §203(a) requirement of nonforfeitability attaches. Plainly, it is the employee's right to his "normal retirement benefit," defined by §3(22) of ERISA, 29 U.S.C. §1002(22), as "the *benefit under the plan* commencing at

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(Footnote continued from preceding page)

Judge Pratt, who decided *Utility Workers* in the district court, was obviously unaware of, and, therefore, disregarded these decisions in recanting his own prior decision in *Carlson* v. *Bundy Mfg. Co.*, Civ. No. 6-72274 (E.D. Mich. Aug. 18, 1977). (Because these prior decisions do not agree with petitioners' reasoning, petitioners dismiss them as "minor" (Brief of Petitioners 18).) Following the Third Circuit decision below, a fourth judge of the same district court, in *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation,* Civ. No. 79-73728 (E.D. Mich. Dec. 11, 1980), rejected Judge Pratt's reasoning. The Sixth Circuit opinion in *Utility Workers* fails to cite *Dotson.*

[4] The majority opinion cites the Third Circuit opinion below (followed by an erroneous "*cert. dismissed*" reference) in an introduction to its opinion, with a statement that "we find ourselves is [*sic*] disagreement with the position taken by the Third Circuit in *Buczynski*" (Slip Opin. 3). Thereafter, the majority fails even to cite the Third Circuit's opinion below.

normal retirement age" (emphasis added).[5] Therefore, to ascertain what is protected against forfeiture and what is not requires a determination of the benefit under the particular plan.

Under the GM Pension Plan, the benefit protected against forfeiture is a benefit that expressly takes into account workers' compensation benefits received by the individual plan participant under the circumstances set forth in Article IV, Section 2 thereof. Indeed, that provision expressly provides for the deduction of workers' compensation benefits "in determining the monthly benefit payable under this Plan." Thus, the workers' compensation deduction is as much a part of the calculation of a participant's "benefit under the plan" as the mathematical computation of his accrued benefit—itself defined, by §3(23)(A) of ERISA, 29 U.S.C. §1002(23)(A), in terms of the benefit "determined under the plan."[6]

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[5] Thus, §203(a) is inapplicable to early retirement or disability benefits payable prior to normal retirement age. *Hepple* v. *Roberts & Dybdahl, Inc.*, 622 F.2d 962 (8th Cir. 1980); *Riley* v. *MEBA Pension Trust*, 586 F.2d 968 (2d Cir. 1978); *Capocci* v. *General Motors Corporation*, 444 F.Supp. 1306 (D. Hawaii 1978). This was recognized by the district court in the order under appeal (JA86a).

[6] Therefore, the emphasis placed by petitioners (Brief of Petitioners 32-34) and by appellants in *Alessi* (Brief of Appellants 16-19) on the concept of a pension as a form of "deferred compensation" is meaningless. Granting the premise that pensions are a form of deferred compensation for which petitioners and their fellow employees bargained collectively through their Union in lieu of present cash wages, the obvious question is for what deferred compensation they so bargained. The answer is obvious: only for a pension determined by taking into account such amounts as may be received by the retired employee as workers' compensation benefits under circumstances for which Article IV, Section 2 of the GM Pension Plan prescribes a deduction. Thus, in the operation of the definition of the benefit under the plan, petitioners have received everything for which they bargained; neither less nor, as petitioners would have it, more.

(Footnote continued on following page)

The benefit an individual will receive upon retirement is simply his accrued benefit mutiplied by his vesting percentage. The distinction between the entirely separate concepts of the structure and definition of the accrued benefit, on the one hand, and vesting and nonforfeitability, on the other, lies at the heart of the present case. As the juxtaposition of the terms within ERISA §203(a) indicates, the concept of "nonforfeitability" is inherently intertwined with the concept of "vesting." Indeed, the two together form a single concept.[7] All vesting does is to determine when and to what extent an employee has acquired a claim to a benefit such that no further service with the employer under whose plan the benefit is provided is required to qualify for that benefit.[8] It was to this concept, and only this concept, that Congress addressed the concern stated in §2(a) of ERISA "that despite the enormous growth in such [employee benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans."[9] Congress met this concern by

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(Footnote continued from preceding page)

There is no contention by petitioners that the GM Pension Plan makes anything less than full and adequate disclosure of this to apprise all plan participants thereof in advance of their retirement. See n. 13, *infra*. Thus, the observations of appellants in *Alessi* concerning the disclosure requirements of ERISA (Brief for Appellants 21-22 nn. 16-17) are inapposite.

[7] *See* ERISA §3(25), 29 U.S.C. §1002(25), which defines "vested liabilities" as "the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are non-forfeitable."

[8] *See, e.g., Nachman Corporation* v. *Pension Benefit Guaranty Corporation,* 446 U.S. 359, 378 n. 27 (1980). The concept long antedates and is unchanged by ERISA.

[9] Not, as petitioners suggest, to a benefit definition that includes integration with workers' compensation benefits, which, perforce, form part of the "anticipated retirement benefits" which petitioners could expect to receive upon retirement.

mandating adoption of one or another of the vesting schedules provided in §203(a)(2), GM's compliance with which is conceded by petitioners.

The other element in the benefit equation—the accrued benefit which is protected against forfeiture—is nowhere addressed in §203(a). Therefore, the definition of what constitutes the accrued benefit must be sought elsewhere; specifically, in the plan provisions defining the "benefit under the plan." Assuredly, ERISA spells out in careful detail not merely the rate at which an employee's right to nonforfeitability vests, but also the rate of accrual of benefits,[10] the rate at which the employer must fund its obligation for such accrued liabilities,[11] and the form and payment of benefits.[12] However, there is nothing that regulates the structure of the benefit afforded to plan participants,[13] beyond the provision in ERISA §206(b), 29 U.S.C. §1056(b), and its counterpart, Code §401(a)(15), 26 U.S.C. §401(a)(15) (added by ERISA), imposing limitations upon the integration of benefits under the Social Security Act and the Railroad Retirement Act, which will be discussed more fully *infra*.

Therefore, to contend, as petitioners do, that a benefit determined by taking into account, by way of deduction or offset, amounts received under workers' compensation award violates ERISA §203(a), because such is not provided for therein, is to say nothing at all. The determination of the amount of the benefit under a pension plan is a matter outside the scope of §203(a).

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[10] ERISA §204, 29 U.S.C. §1154.

[11] ERISA §301 *et seq.*, 29 U.S.C. §1081 *et seq.*

[12] ERISA §§205 and 206, 29 U.S.C. §§1055 and 1056.

[13] That this structure may take into account "circumstances . . . which may result in a reduction or elimination of accrued benefits or of nonforfeitable benefits" is clear from the Secretary of Labor's proposed regulation requiring that such circumstances be described in the summary plan description mandated by ERISA §105(a), 29 U.S.C. §1025(a). See DOL Prop. Reg. 29 C.F.R. §2520.105-2(e)(5)(iii), 45 Fed. Reg. 51321 at 51329 (Aug. 1, 1980).

The foregoing is fully consistent with this Court's decision in *Nachman Corporation* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980).[14] Petitioners and appellants in *Alessi* invoke and seek to read much into Justice Stevens' statement, in a footnote reference to §203(a) in his opinion for the Court, that:

> "A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date." 446 U.S. at 366 n. 10.

Both petitioners and appellants juxtapose this quotation with the later reference in the opinion to Congress' wishing to make "sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it." 446 U.S. at 375. However, that reference was to the finding by Congress, in §2(a), "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." Obviously, as pointed out above, those observed problems bear no relation to §203(a) or the question now before the Court, and the statements by the Court, though valid in *Nachman*, are *obiter* here.[15]

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[14] *Nachman*, of course, involves the construction and application of the plan termination provisions of Title IV of ERISA, not directly involved herein, and the Court's references in its opinion to §203 of ERISA should be read in that light.

[15] The reference would be irrelevant even if it were to the problem of the loss of benefits through failure to meet vesting requirements also addressed in ERISA §2(a), 29 U.S.C. §1001(a), since, as noted at pp. 10-11, *supra*, Congress sought to resolve that problem by mandating the vesting schedules in ERISA §203(a)(2), not through regulation of the mode of computing the benefit to which such vesting should apply.

Far more pertinent here are the Court's observations, as to the definition of "nonforfeitable" in §3(19), that "the principal subject of the definition is the word 'claim;' it is the claim to the benefit, rather than the benefit itself, that must be 'unconditional' and 'legally enforceable against the plan,'" 446 U.S. at 371. Obviously, the "claim" cannot exist without the "benefit," and the mode of determining the structure of the benefit is essentially unregulated by ERISA.

Equally pertinent is the Court's further observation, regarding the definition of "forfeiture" as used in §203(a), that:

> "Third, the term 'forfeiture' normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly described as not causing a forfeiture listed in §203 (a)(3) see n. 10, *supra,* describes an event—such as death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of 'non-forfeitable' to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect." 446 U.S. at 372-73

Although the "limit" on the benefit amount receivable to which the Court referred in *Nachman* was the limit imposed by the adequacy of plan assets, the Court's reasoning is no less applicable to a limit imposed by the structure of the benefit under the plan. Indeed, since the "limit" imposed by the computation of the benefit under the plan operates even before the promise of a right to a benefit arises, and defines that as to which the promise applies, it surely cannot constitute a forfeiture within the meaning of §203(a).

The Sixth Circuit majority in *Utility Workers, supra,* fail to recognize the basic distinction between the two concepts in its preoccupation with what they deem "excessive attention to the phrase 'under the plan'" in ERISA

§3(19).[16] Thus, the *Utility Workers* majority are concerned that if they were to follow the express statutory distinction between benefit structure, on the one hand, and nonforfeitability, on the other, "a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into its pension plan's computation procedures" (Slip Opin. 7). They correctly recognize, in the next sentence of their opinion, that this result "would be contrary both to the provisions and to the spirit of ERISA" (*ibid.*); however, they mistake the reason this result cannot obtain under ERISA. Their confusion of statutory concepts is demonstrated by the citation of *Keller* v. *Graphic Systems of Akron, Inc., Employees Profitsharing Plan,* 422 F.Supp. 1005, 1008 (N.D. Ohio 1976), for the proposition that §203(a) of ERISA prohibits the denial of a pension by reason of the employee's post-retirement violation of a covenant against competition.[17] It is undoubted that this result is correct. However, it is so because the denial of the pension relates solely to the claim of right to the pension—vesting—and not to the determination of the accrued benefit to which vesting applies.[18] The result, therefore, does not require—nor can

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[16] Slip Opin. 7, citing the opinion of the district court therein, 453 F.Supp. at 452 n. 8.

[17] The enunciation of the principle therein was by way of *dictum,* the court having held §203(a) inapplicable, as the termination of employment occurred prior to its effective date (see n. 1, *supra*).

[18] Thus, petitioners' citation of other post-retirement employment cases such as *Amory* v. *Boyden Associates,* 434 F.Supp. 671 (S.D. N.Y. 1976), *Lewis* v. *Merrill, Lynch, Pierce, Fenner & Smith,* 431 F.Supp. 271 (E.D. Pa. 1977), and *Riley* v. *MEBA Pension Trust,* 570 F.2d 406 (2d Cir. 1977), *on remand,* 452 F.Supp. 117 (S.D. N.Y. 1978), *aff'd,* 586 F.2d 968 (2d Cir. 1978) (which involve the loss of a pension for employment in the same industry), and such "bad boy" clause cases as *Winer* v. *Edison Bros. Stores Pension Plan,* 593 F.2d 307 (8th Cir. 1979), and *Fremont* v. *McGraw-Edison Co.,* 606 F.2d 752 (7th Cir. 1979), is inapposite. Further, as discussed more fully at pp. 30-31 and n. 42 *infra,* the limitation upon offsets which may be taken into account in the "benefit under the plan" to statutory benefits, precludes any abuse by the plan sponsor, contrary to the concern of the *Utility Workers* majority and petitioners.

it justify—reading ERISA §3(19) as though it omitted a fundamental and significant phrase.

Thus, the express statutory language demonstrates the intent of Congress that §203(a) of ERISA only protect against loss of the normal retirement benefit as defined by the plan, not (as petitioners contend) that it regulate the structure and computation of that benefit. This, by itself, defeats petitioners' argument.

B. The statutory antecedents and legislative history of ERISA demonstrate the intent of Congress to continue to permit full pre-ERISA benefit integration that includes workers' compensation benefits.

That this general intent applies specifically to the integration of pension plan benefits with other statutory benefits is reflected even more clearly in the background and legislative history of ERISA. As the Third Circuit recognized below, the obvious flaw in petitioners' contention that workers' compensation benefit integration is prohibited by §203(a) because it is not expressly excepted in §203(a)(3) is that the same argument is equally applicable to the more familiar social security benefit integration, also nowhere referred to in §203(a). Yet it is clear that social security benefit integration—which may also be applied through a direct offset to benefits—has survived the enactment of ERISA. ERISA §206(b), and its companion Code provision, §401(a)(15), both provide that the benefits of a participant or beneficiary who is receiving benefits under a pension plan or who was separated from service with nonforfeitable rights to benefits may not be decreased by reason of any subsequent increase in the benefit levels payable or the wage base under Title II of the Social Security Act. ERISA §206(b) provides as well for Railroad Retirement Act benefit integration.[19] It is thus beyond question that ERISA con-

[19] A fact apparently overlooked by the majority in *Utility Workers, supra* (Slip Opin. 8), as well as by petitioners and appellants. Petitioners fail even to cite ERISA §206(b).

templates continuation of integration of benefits under the Social Security and Railroad Retirement Acts. Yet that would be prohibited under petitioners' construction of §203(a). Petitioners' construction of §203(a), therefore, cannot be valid.

Petitioners and appellants in *Alessi* seek support from the very reference to social security benefit integration in ERISA §206(b) and Code §401(a)(15), erroneously considering Code §401(a)(15) the source of authority for social security benefit integration.[20] Indeed, this is the very trap into which the majority in *Utility Workers* fall.[21] Misconceiving Code §401(a)(15) as the true source of statutory authority for social security benefit integration, they reason that as §401(a)(15) refers *only* to social security benefits and not as well to other, *e.g.*, workers' compensation, benefits, it evidences an intention on the part of Congress to limit offsets or reductions of vested pension plan benefits to those for social security benefits or—presumably through an implied application of the principle of *eiusdem generis*—"offsets that are comparable to an offset for a social security payment" (*Utility Workers,* Slip Opin. 8). Thus, the majority view the case as presenting a choice between whether "the workers' compensation offset . . . [is] in the nature of an offset for social security payments—an offset that Congress implicitly sanctioned in the provisions of ERISA—or . . . a forfeiture that is prohibited by the broad non-forfeit-

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[20] *E.g.*, Brief of Petitioners 26; Brief of Appellants 41 n. 34.

[21] As did the district court whose decision it affirmed, taking with it the subsequent courts which adopted its reasoning, including the district court below, *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089 (E.D. Wis. 1980), *appeal pending,* No. 80-1755 (7th Cir.); presumably, *Server* v. *Interpace Corp., appeal pending,* No. 79-3832 (9th Cir.), from a district court decision without opinion; and *Employee Benefits Committee, etc., of Hawaiian Telephone Co.* v. *Pascoe,* Civil No. 78-0483 (D. Hawaii Dec. 15, 1980), which totally misconstrues the Third Circuit's reference herein to Code §401(a)(15).

ability language of section 203(a)" (Slip Opin. 9). Their entire opinion must, therefore, stand or fall on the *a priori* assumption that the source of congressional approval of social security integration lies in Code §401(a)(15). Yet it is apparent that Code §401(a)(15) merely limits, in certain cases,[22] social security benefit integration independently existing and sanctioned elsewhere—specifically, in Code §401(a)(5), 26 U.S.C. §401(a)(5), which long antedates the enactment of ERISA,[23] but is nowhere cited directly in the Sixth Circuit opinion.[24]

Herein lies the key to the correct analysis of what Congress did and did not do in its enactment of ERISA and the demonstration of the fundamental error in the *Utility Workers* decision and the argument of petitioners herein. Petitioners (and, as well, appellants in *Alessi* and their *amici*) and the *Utility Workers* majority would have this Court treat Congress as though it were, in the enactment of ERISA, writing on a clean slate. Manifestly, it was not. ERISA is by no means the first undertaking of Congress to regulate the private pension system. The House Ways and Means Committee recognized this when it stated that:

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[22] In so doing, Code §401(a)(15) and ERISA §206(b) essentially codified pre-ERISA law as construed by the Internal Revenue Service. See H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 29 (1974), II Legislative History of the Employee Retirement Income Security Act of 1974, at 3421, 3449 (S. Comm. on Labor and Public Welfare, Subcomm. on Labor, 1976) hereinafter referred to as "Leg. Hist.").

[23] The proposal to suspend integration cited in the Brief of *Amicus Curiae* Gray Panthers 25-26, embodied in H.R. 2, §1021(g), as reported in H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 131 (1974), III Leg. Hist., at 4405, was deleted by H. Con. Res. 609, §17, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4722, and never enacted. Obviously, the minority views cited do not reflect the intention of Congress.

[24] The only reference to Code §401(a)(5) is through the citation (Slip Opin. 14) of Rev. Rul. 68-243, 1968-1 C.B. 157, which cites §401(a)(5).

> "Essentially, your committee's bill represents a significant improvement in the tax treatment now applicable with respect to qualified retirement plans. Your committee regards the present legislation as part of an evolutionary process which keeps this basic framework but which builds on it new provisions which experience indicates are necessary for the proper functioning of these plans." H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 8 (1974), II Leg. Hist., at 3128.

Therefore, to ascertain the intention of Congress in ERISA, one must look to the antecedent history of Congressional regulation of the private pension system. That history, insofar as it relates to benefit integration, goes back to 1942, when Congress enacted §165(a)(4) and (5) of the Internal Revenue Code of 1939, recodified as §401(a)(4) and (5) of the Internal Revenue Code of 1954, 26 U.S.C. §401(a)(4) and (5), without essential change.[25]

Section 401(a)(5) essentially builds upon §401(a)(4), which precludes a pension plan from being qualified under the Code if the contributions or benefits provided thereunder "discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees." Section 401(a)(5) provides—since the enactment of ERISA as before—that a plan will not be considered discriminatory merely because the contributions or benefits of or on behalf of the employees under the plan "differ because of any retirement benefits created under State or Federal law."

The phrase "retirement benefits created under State or Federal law" is not further defined by statute. In 1968, however, the Internal Revenue Service issued Rev. Rul. 68-243, 1968-1 C.B. 157, holding, by way of defining and applying the phrase, that "the benefits payable under a workmen's compensation law or occupational diseases law . . . are acceptable as an offset against benefits payable

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[25] Revenue Act of 1942, P.L. 753, 56 Stat. 798, §162.

under [a] qualified pension plan." The Service subsequently incorporated Rev. Rul. 68-243 in substance into its "Guides for Qualification of Pension, Profit Sharing, and Stock Bonus Plans" in Rev. Rul. 69-421, Part 4(j)(4), 1969-2 C.B. 59, 72, in the following terms:

> "Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. *Thus, benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan.* However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. See Rev. Rul. 68-243, C.B. 1968-1, 157." Emphasis added.

This provision was included without change in the February, 1972, edition of the "Guides for Qualification of Pension, Profit Sharing and Stock Bonus Plans," IRS Publication 778, Part 4(j)(4), p. 15 (2-72).[26]

Title II of ERISA contains numerous amendments to §401 *et seq.* of the Code, including the addition of Code §411—the direct parallel of ERISA §203 in Title I—and the addition of two new sentences to IRC §401(a)(5) not relevant here.[27] There has been no relevant change in the statutory provision under which Rev. Rul. 68-243 was issued and twice republished, and its holding, therefore, remains unaffected by the enactment of ERISA.[28]

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[26] Reproduced in BNA Tax Management Portfolio No. 351, p. B-1401 at B-1415 (1979).

[27] The added material deals with problems of benefit integration involving two or more plans of the same employer.

[28] That Rev. Rul. 68-243 continues to be given effect since the enactment of ERISA is seen in Rev. Rul. 78-178, 1978-1 C.B. 117, where the Internal Revenue Service reaffirmed its holding therein. See p. 25, *infra*.

This Court stated in *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938), that:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."

To the same effect, *see NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Commissioner* v. *Noel*, 380 U.S. 678, 681-82 (1965).

Petitioners attempt to denigrate Rev. Rul. 68-243 as merely the opinion of a single attorney within the Internal Revenue Service that is entitled to little regard.[29] However, the deference to be accorded administrative interpretations of a statute by the agency chosen to enforce it is not confined to a formally promulgated regulation, but is equally applicable to a published Revenue Ruling, which represents "an official interpretation by the Service," 26 C.F.R. §601.201(a)(6) (1980). *E.g., United States* v. *Leslie Salt Co.*, 350 U.S. 383, 389-96 (1956). Such deference has been extended fully to the principle of "express and implied congressional acquiescence . . . through Congress having let the administrative interpretation remain undisturbed," despite amendment of the statute. *United States* v. *Leslie Salt Co., supra*, 350 U.S. at 396-97.

In any event, the incorporation of the holding of Rev. Rul. 68-243 into Rev. Rul. 69-421 and IRS Publication 778 (2-72), *supra*, constitutes it a fundamental and integral part of the comprehensive "Guides for Qualification of Pension, Profit Sharing, and Stock Bonus Plans that governed private pension plans in the United States at the time of enactment of ERISA and were then known to Con-

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[29] Brief of Petitioners 28; Brief of Appellants 29. Contrary to appellants' suggestion (Brief of Appellants 31), Rev. Rul. 68-243 is a "formal published ruling."

gress.[30] Accordingly, the failure of Congress to take affirmative action in ERISA to prohibit the offsets authorized therein is appropriately viewed as sanctioning such offsets.[31]

However, it is not necessary to rely solely upon a negative inference from the reenactment of Code §401(a)(5) in ERISA without change. Congress has made its intention admirably clear in the Conference Committee Report accompanying the bill enacted as ERISA, in stating that:

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[30] Congress' familiarity with IRS Publication 778 in its enactment of ERISA is shown by its citation thereof, in an unrelated context, in S. Rep. No. 93-383, 93d Cong., 1st Sess., at 94 (1973), I Leg. Hist., at 1162, a fact of which the majority in *Utility Workers* were apparently unaware, judging from the absence of any reference thereto while citing Rev. Rul. 68-243 and Rev. Rul. 69-421, *supra*.

[31] Particularly since workers' compensation benefit integration is included in the pension plans of the steel industry (see Brief of Crucible Inc., Jones & Laughlin Steel Corporation, Mesta Machine Company, Pullman-Standard, Shenango Inc., United States Steel Corporation, and Wheeling-Pittsburgh Steel Corporation as *Amicus Curiae* in the Third Circuit and the like brief *Amicus Curiae* leave to file which has been sought herein on behalf of the steel industry) as well as those of the motor vehicle manufacturing industry.

To suggest, as the *Alessi* appellants do (Brief of Appellants 19-20 n. 15), that the less common occurrence of the workers' compensation offset perceived by the Report of Hay Associates cited therein (which expressly denies that its views necessarily represent the views of the U.S. Department of Labor), despite its presence in plans in the important steel and automotive industries, is responsible for the absence of any express reference thereto in ERISA is to prove too much, at least for their argument. If anything, it leads to the conclusion that Congress did not view that offset as a source of concern and, therefore, did not take any action to prohibit its employment in pension plans, rather than (as petitioners and appellants would have it) that Congress should be deemed to have prohibited a practice of which they had no expressed concern.

> "Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 277 (1974), III Leg. Hist., at 4544.

That this expression of congressional intent relates directly to the nonforfeiture provisions of ERISA §203 may be seen in the fact that it is found in a discussion of "the relationship of the minimum vesting standards of the bill to the antidiscrimination rules of present law (sec. 401 (a)(4) of the Internal Revenue Code)." *Id.*, at 277, III Leg. Hist., at 4543. Thus, the provisions of §203(a) relating to vesting and nonforfeitability cannot be read except in context with the preexisting and continuing antidiscrimination rules evolved under the long pre-ERISA history of Code §401(a)(4) and (5), which include the approval of workers' compensation benefit integration.[32]

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[32] The *Utility Workers* majority's unawareness of this undeniable fact is clear from their closing statement at Slip Opin. 13, which betrays throughout a lack of understanding of the history and structure of pension plan regulation prior to ERISA and since, upon which ERISA itself is premised (matched by *Alessi* appellants' reference to taking Code §401(a)(5) into account in construing ERISA §203(a) as a "wholesale addition to the statute" (Brief of Appellants 31)). It is remarkably similar to that of the district court in *Utility Workers, in* 453 F.Supp. at 455 n. 11, addressed to 26 C.F.R. §1.411(a)-4(a), which followed, rather than preceded, enactment of ERISA, thus making the court's observation a complete *non sequitur.*

The majority allude to some other basis for their determination to disregard the thrice-promulgated pre-ERISA approvals of

(Footnote continued on following page)

A contrary view of the relationship of Code §401(a)(4) and (5) to ERISA §203 and Code §411 requires attributing to Congress an intent to effect an implied partial repeal of Code §401(a)(5) by ERISA §203 and Code §411.[33] If an implied repeal of an earlier statute by a later one is not to be assumed, *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974), the implied repeal by one part of a statute of a provision separately reenacted in the same statute must certainly be rejected.

If further demonstration were needed that the concepts of "forfeiture" and integration "offset," on the absolute identity of which petitioners' argument and the majority conclusion in *Utility Workers* depend, are distinct and mu-

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workers' compensation benefit integration. However, their opinion gives no further inkling of any other basis therefor. The only possible conclusion, therefore, is that the *Utility Workers* majority denied these Treasury interpretations the dispositive sanction of congressional approval only because they were unaware that Congress had reaffirmed pre-ERISA antidiscrimination rules while adopting the minimum vesting provisions of ERISA §203(a) and Code §411(a).

[33] Further, ERISA §302(c)(4)(A), 29 U.S.C. §1082(c)(4)(A), and its Code counterpart, §412(c)(4)(A), in providing for minimum funding taking into account changes in "retirement benefits created under Federal or State law," point up the fact that pension plans that integrate workers' compensation benefits have necessarily been funded on the assumption of such integration. To undo such integration retroactively to the first plan year beginning on or after January 1, 1976 (see n. 1, *supra*), could have a significant deleterious impact upon the funding of such plans, possibly threatening the stability and continued existence of such plans. This was recognized by the dissenting judge in *Utility Workers, supra* (Slip Opin. 22), consistently with the observations of this Court in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 246-47 (1978), in a not dissimilar context.

tually inconsistent,[34] it is found in the fact that the concept of "nonforfeitability" was introduced for the first time not in ERISA, but in Code §401(a)(7), enacted in 1962.[35] As enacted, §401(a)(7) required that, to be qualified, a pension plan must provide that "upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable." This was changed by ERISA to a simple requirement that the plan, upon termination, meet the requirements of Code §411, the counterpart of ERISA §203. This demonstrates that, although the rules relating to forfeitures were codified and modified by ERISA, the concept of nonforfeitability long antedated ERISA and subsisted side by side with Code §401(a)(5), long construed as approving the very workers' compensation offsets in issue here.[36]

It is thus clear from the reenactment of pre-ERISA Code provisions, the new enactment of complementary ERISA provisions, and the expressed intent of Congress that Congress deliberately intended to import into ERISA and continue in effect the pre-existing rules sanctioning plan benefit integration, including the thrice promulgated approval of workers' compensation benefit integration that formed

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[34] Contrary to the assertion in Brief of *Amicus Curiae* Gray Panthers 21. Nor does the Treasury's proposal of new vesting regulations in 45 Fed. Reg. 24201 (Apr. 19, 1980), cited therein, signify otherwise; the proposed regulations merely reflect the minimum vesting standards newly added by ERISA §203(a)(2).

[35] Code §401(a)(7) was enacted as part of the Self-Employed Individuals Tax Retirement Act of 1962, P.L. 87-792, 76 Stat. 809, §2, but is of general applicability to all pension plans.

[36] It should be noted that the GM Pension Plan provision here in issue itself antedated the enactment of ERISA, the current version thereof going back to 1970, while maintaining its qualified status under Code §401 *et seq.*

an integral part of pension plan structure for at least six years before ERISA and has received continuing Treasury endorsement for more than six years since ERISA.

C. The Treasury Department's adoption of 26 C.F.R. §1.411(a)-4(a) confirms the continued validity of workers' compensation benefit integration.

It is within the statutory framework discussed in the preceding section of this brief that the administrative construction of §203 of ERISA and its complementary and interrelated Code provisions both pre- and post-ERISA, must be considered. In 1977, the Treasury Department, in T.D. 7501, 42 Fed. Reg. 42326 (1977), promulgated Treas. Reg. 26 C.F.R. §1.411(a)-4(a) (1980), which provides that:

> "[N]onforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits."

It is unmistakable that the Treasury Department intended, by its adoption of 26 C.F.R. §1.411(a)-4(a), to incorporate into the structure of ERISA §203 and Code §411 the basic concepts of benefit integration under which the offset of workers' compensation benefits against pension plan benefits under defined benefit pension plans has been upheld since at least 1968. Indeed, the Internal Revenue Service contemporaneously reaffirmed Rev. Rul. 68-243 in Rev. Rul. 78-178, 1978-1 C.B. 117, in distinguishing unemployment compensation benefits, which may not be offset against pension plan benefits, from workers' compensation benefits, which may be offset.[37]

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[37] Thus, it is simply internally inconsistent for the *Utility Workers* majority to suggest, as they do, that one may accept the Treasury regulation as valid and effective while at the same time rejecting the foundation on which it was built and which comprehends within it workers' compensation benefit integration.

That the Treasury Department has ample authority to promulgate regulations in this area applicable not only to Code §411 but also to ERISA §203 is clear: ERISA §3002 (c), 29 U.S.C. §1202(c), expressly provides that regulations prescribed by the Secretary of the Treasury under Code §411 shall also apply to the resulting standards set forth in ERISA §203 and expressly prohibits the Secretary of Labor from prescribing regulations or interpreting and applying §203 in a manner inconsistent with the way such regulations apply under §411.[38] Citing this Court's decision in *Batterton* v. *Francis*, 432 U.S. 416 (1977), and its own prior decision in *Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979), the Third Circuit held below that 26 C.F.R. §1.411(a)-4(a) is a "legislative regulation" and that in order to sustain such a legislative regulation, "we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or capricious, nor contrary to the governing statutory section and ERISA as a whole" (J.A.100a, quoting 609 F.2d at 692).[39]

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[38] This preclusion of the Secretary of Labor is reflected in the Department of Labor's own regulations under ERISA in 29 C.F.R. §2530.200a-2 (1980). It has also been confirmed in Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713, §101(c) (Oct. 18, 1978), which also removes from the Secretary of Labor and vests in the Secretary of the Treasury all regulatory, ruling, and opinion functions under §3(19) of ERISA, 29 U.S.C. §1002(19), *i.e.*, the definition of "nonforfeitable."

[39] This analysis was subsequently adopted by the Sixth Circuit as to a companion regulation in *General Motors Corporation* v. *Buha*, 623 F.2d 455, 462-63 (6th Cir. 1980), and, indeed, is reaffirmed in its *Utility Workers* decision (Slip Opin. 12-13). Petitioners (and, at even greater length, appellants in *Alessi*) contend that the Third Circuit erred in classifying 26 C.F.R. §1.411 (a)-4(a) as a legislative regulation, because Congress did not make an express delegation therein of the authority to define and prescribe standards (Brief of Petitioners 26-27; Brief of Appellants 23-28). However, the delegation of authority in ERISA §3002(c) is not significantly different from that in some of the other sta-

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Whether 26 C.F.R. §1.411(a)-4(a) be deemed legislative or merely interpretative, this Court has repeatedly held "that Treasury regulations must be sustained unless unreasonably and plainly inconsistent with the revenue statutes." *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Bingler* v. *Johnson*, 394 U.S. 741, 750 (1969). This has been considered particularly apt where, as here, the regulation "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts works efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *see also Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). To sustain a regulation, this Court "need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). That 26 C.F.R. §1.411(a)-4(a) meets this test must follow from an examination of the statutory and legislative history detailed above.

The regulation commands even greater deference in weight when read in concert with the regulations of the Pension Benefit Guaranty Corporation, the agency established within the Department of Labor under Title IV of ERISA for the purpose, *inter alia*, of providing "for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this

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tutory provisions treated by the Court in *Batterton* v. *Francis*, 432 U.S. 416, 425-26 and n. 9 (1977), as giving rise to legislative regulations. Appellants further confuse formally promulgated Treasury regulations, to which ERISA §3002(c) relates, with Internal Revenue Service administrative determinations in individual cases, which ERISA made subject to judicial review in Code §7476, 26 U.S.C. §7476 (Brief of Appellants 26). Obviously, one bears no relation to the other.

title applies." ERISA §4002(a), 29 U.S.C. §1302(a). The PBGC is required by §4022(a) of ERISA, 29 U.S.C. §1322(a), to "guarantee the payment of all nonforfeitable benefits . . . under the terms of a plan which terminates at a time when section 4021 applies to it." The PBGC regulations provide in 29 C.F.R. §2604.3 (1980) that the PBGC will guarantee the amount of a benefit only if the participant is entitled to the benefit under 29 C.F.R. §2605.5 (1980) and the benefit qualifies as a pension benefit defined in 29 C.F.R. §2605.2 (1980) and is nonforfeitable under 29 C.F.R. §2605.6 (1980). The term "pension benefit" is defined in 29 C.F.R. §2605.2 (1980) as meaning "a benefit payable as an annuity, or one or more payments related thereto, to a participant who permanently leaves or has permanently left covered employment, or to a surviving beneficiary, which payments by themselves *or in combination with Social Security, Railroad Retirement, or workmen's compensation benefits provide a substantially level income to the recipient*" (emphasis added).

Thus, the regulations of the PBGC, to which this Court gave deference and weight in *Nachman, supra,* recognize expressly that a pension benefit may be nonforfeitable under ERISA even though subject to integration with workers' compensation benefits. This concurrence of the PBGC[40] and the Treasury Department in the promulgation of their respective regulations under ERISA provides strong, if not dispositive, support for the continued vitality of workers' compensation benefit integration.

In sum, 26 C.F.R. §1.411(a)-4(a) cannot exist in a vacuum, separated from the statutory, regulatory, and administrative history that preceded it and preceded the enactment of ERISA, as much as the panel majority in *Utility Workers* may wish it so. When read together, all the parts fall into place and operate with internal consistency with and within the structure and scheme of ERISA.

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[40] And the Secretaries of Labor, Commerce, and the Treasury who comprise its Board of Directors. ERISA §4002(d), 29 U.S.C. §1302(d).

D. Integration of workers' compensation benefits is rational, appropriate, and consistent with law.

The foregoing is, as the Third Circuit recognized, dispositive of the issue. Realizing this, petitioners and appellants in *Alessi* turn their attack upon the policy considerations inherent in workers' compensation benefit integration—much as the *Utility Workers* majority do through the medium of attempting to analyze whether workers' compensation benefits and social security benefits are "like" benefits, continuing to operate under the misconception that Code §401(a)(15) is the source of benefit integration authority and, as such, is limited to social security benefits.

The *Utility Workers* majority mount their attack on the comparability of social security and workers' compensation benefits from several directions. First, they attack a test of comparability that is predicated solely upon the fact that both types of benefits are employer-funded. Yet employer financing clearly lies at the heart of the concept of integration.[41]

The majority next question the premise of Rev. Rul. 68-243 that the workers' compensation system, like the social security program, "makes benefits available to the general public." Surely, the fact that an employee must sustain a disability within the course of his employment does not detract from the fact that all employees are members of the system that affords such benefits when the proper conditions of eligibility therefor have been met. Indeed, the same observation could be made with respect to social security benefits, which include disability benefits conditioned upon occurrence of a statutorily suf-

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[41] This is perhaps best seen in the integration of social security and pension benefits in a defined contribution pension plan that benefits self-employed individuals, in which integration is accomplished through a direct reduction in contributions, and, therefore, benefits, by the amount of the employer's share of the social security tax. *See* Treas. Reg. 26 C.F.R. §1.401-12(h)(3)(ii) (1980).

ficient degree of disability. In each case, attainment of eligibility for receipt of benefits does not alter the fact that the benefits are available, at the outset, to all who will become eligible.

The *Utility Workers* majority seize upon what they refer to as a "source of entitlement" test, seeking justification for it in the fact that ERISA §3(19) defines "nonforfeitable" in terms of its reference to the "benefit under a pension plan which arises from the participant's service," emphasizing the last clause (Slip Opin. 17-18). However, that clause certainly cannot have the meaning they would attribute to it, since all benefits under a pension plan—indeed, all employment-related benefits—have their "source of entitlement" in service with the employer, whether or not the benefit is measured by the length of service. There is no other source.

A more rational and statutorily sound basis on which to determine the appropriateness of integration of a particular type of statutory benefit[42] with benefits available under a pension plan is whether the benefits together form part of "an integrated and correlated retirement system." Treas. Reg. 26 C.F.R. §1.401-4(b). Thus, as Rev. Rul. 78-178, 1978-1 C.B. 117, provides, unemployment compensation benefits and "benefits payable under State or Federal programs because of sickness and maternity and which include cash benefits and medical services" may not be integrated with pension plan benefits because they are benefits of a

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[42] Both Code §401(a)(5) and 26 C.F.R. §1.411(a)-4(a) limit integration to benefits provided by statute; thus, an employer may not integrate plan benefits with other, nonstatutory, sources of wage replacement, such as the private insurance proceeds or wages from another employer to which the *Utility Workers* majority point in an attempted *reductio ad absurdum* (Slip Opin. 17), thus refuting the "Pandora's box" fears expressed by petitioners and appellants.

type which may not be provided under a pension plan. *See* Treas. Reg. 26 C.F.R. §1.401-1(b)(1)(i) (1980).[43]

On the other hand, a pension plan may and customarily does provide benefits upon retirement for disability as well as retirement for age, and for work-related disabilities as well as those not so related. Social security disability benefits and benefits provided by a workers' compensation statute fulfill a like function. Indeed, the existence of a direct relationship between workers' compensation benefits and pension plan benefits is readily demonstrated by the existence of a direct relationship between workers' compensation benefits and social security benefits, the relation of which to pension plan benefits is conceded by all.[44] Congress has expressly provided, in §224 of the Social Security Act, 42 U.S.C. §424a, for the deduction from social security disability benefits of benefits "under a

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[43] The lengthy attempt by appellants in *Alessi* (Brief of Appellants 35-38) to deride the regulations and rulings of the Treasury Department and the Internal Revenue Service on the basis of their supposed ignorance of workers' compensation principles is particularly misguided as to the Service's distinction between workers' compensation benefits and sickness benefits. 26 C.F.R. §1.401-1(b)(1)(i) expressly precludes providing in a pension plan for such uncustomary benefits as "layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses," except to the limited and subordinate extent permitted in Code §401(h), 26 U.S.C. §401(h). The distinction lies not in the source of the disability but in the nature of the benefits; *i.e.*, benefits to replace out-of-pocket expenditures, whether caused by sickness or accident, may not be provided or offset, while other disability benefits may be both provided and offset, whether arising from sickness or accident. As in the case of the distinction between workers' compensation benefits and common-law tort damages (see n. 45, *infra*), the distinction is one that is entirely rational in the statutory framework.

[44] The mere fact (cited in Brief of Appellants 33 n. 27) that workers' compensation benefits are excluded from taxable income, while pension benefits are taxable, cannot be of significance, as social security benefits are equally free from tax but nevertheless may be integrated with pension benefits.

workmen's compensation law or plan of the United States or a State."[45]

The linkage of benefits for age and benefits for disability in the sytem of federal old age, survivors, and disability benefits ("OASDI") under the Social Security Act points up a basic but significant fact: that "retirement" applies to a broad continuum of benefits, the payment of which may be triggered by a variety of acts or events, more or less inevitable, voluntary, or work-related. Whether the qualifying event be age, death, disability (work-connected or not), or merely severance of the employment relation by reason of none of the foregoing,[46] a resulting benefit is deemed a "retirement" benefit under a pension plan.

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[45] Petitioners and appellants attack the distinction drawn in Rev. Rul. 68-243 between statutory workers' compensation benefits, which may be deducted from pension plan benefits, and damages recovered against the employer in an action at common law, which may not be deducted, contending that as the statutory remedy is historically merely a substitute for the common-law right of action, any distinction between the two is erroneous. Yet, such a distinction is not peculiar to the Treasury Department. The same distinction was made in 42 U.S.C. §424a, and the same contention made here by petitioners and appellants was raised thereunder and rejected in *Richardson* v. *Belcher*, 404 U.S. 78 (1971). The limitation of the 42 U.S.C. §424a offset to disability benefits reflects this legislative history. *See Lofty* v. *Richardson*, 440 F.2d 1144, 1151-52 (6th Cir. 1971), *cert. denied*, 404 U.S. 985 (1971). As it does not affect the normal retirement benefits involved herein and to which §203(a) of ERISA is limited, the inaccurate suggestion by *amicus curiae* Gray Panthers of a possible "double offset" is not relevant. That this offset is expressly provided by statute does not detract from the validity of a workers' compensation offset not the subject of a similar express statutory provision, since social security benefits, being a creature of statute, are necessarily subject to reduction only by express statutory provision, unlike private pension plan benefits, the adoption and structure of which are voluntary.

[46] The circumstances under which a severance pay plan may be deemed a retirement benefit plan—a term most broadly defined in ERISA §3(2), 29 U.S.C. §1002(2)—are set forth in DOL Reg. 29 C.F.R. §2510.3-2 (1980).

Herein lies the answer to the varied, strained, and tortuous arguments the *Utility Workers* majority invoke to support their ultimate holding—a holding dictated, as their conclusion shows, by a concern with the two hypothetical employees who leave employment after earning comparable wages and completing comparable years of service, one with a work-related disability for which he receives a workers' compensation award and the other without disability. That the two should receive comparable benefits, taken in the aggregate, strikes the majority as unfair. Yet that is the position in which a similarly disabled retiree could find himself if his disability were not compensable under a workers' compensation law. The assumption inherent throughout the majority opinion in *Utility Workers* is that somehow the employer is at fault and should be penalized where the disability is work-related. However, it is clear beyond dispute that workers' compensation is a form of employer-financed social insurance entirely unrelated to employer fault.[47] Hence, the assumption and the arguments devised to support it must fail.

In the final analysis, the rationality of the principle of integration of private pension plan benefits and workers' compensation benefits lies in the fact that such integration constitutes a logical and integral part of an overall system of wage-loss protection and wage replacement as much as the obviously older and more universal system of benefits under the Social Security Act. *See* 4 A. Larson, *The Law of Workmen's Compensation*, c. XVIII, esp. at §§96.20 and 97.10 *et seq.* (1979 ed.)[48]

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[47] *See* A. Larson, "Basic Concepts & Objectives of Workmen's Compensation," 1 *Supplemental Studies of National Commission on State Workmen's Compensation* 31 at 32 (1973).

[48] "97.10 *Impropriety of duplicate benefits*

"Wage-loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to

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Like social security and railroad retirement benefits, workers' compensation benefits are employer-financed—indeed, entirely so, in contrast to social security benefits, which are partially employee-financed[49]—and payable without regard to employer fault. All three classes of benefits are intended to alleviate and replace loss of income when active wages cease. Petitioners and appellants concede that where the employer has already replaced an employee's loss of income through a pension—whether for age or disability retirement—the employer is entitled to claim an offset for social security or railroad retirement benefits he has helped provide through his financing. Logic —not to mention the law as consistently construed and applied by the Treasury Department—permits no differ-

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> the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workmen's compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle. If this is denied, then all coordination becomes impossible and social legislation becomes a grab-bag of assorted unrelated benefits." 4 A. Larson, *The Law of Workmen's Compensation*, §97.10 (1979 ed.)

The same conclusion was reached in the *Report of the National Commission on State Workmen's Compensation Laws*, at 66 (1972), pursuant to §27 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §676.

[49] *See* Code §3101 *et seq.*, 26 U.S.C. §3101 *et seq.* (the Federal Insurance Contributions Act), and Code §3201, 26 U.S.C. §3201 *et seq.* (the Railroad Retirement Tax Act).

ent treatment for the third class of employer-financed benefits, workers' compensation benefits.[50] When received for a disability commencing (or extending) after retirement for age (whether at normal retirement age or prior thereto), workers' compensation benefits fulfill the same basic function as social security, railroad retirement, and pension benefits, namely, providing post-retirement income to replace pre-retirement wages. That the mode of providing workers' compensation benefits may differ from jurisdiction to jurisdiction is not relevant. Whether such benefits be provided by a state-operated insurance fund to which all employers must contribute, by state-mandated private insurance, or by self-insurance permitted as an alternative to either, the only relevant fact is the same: that the benefits paid are state-mandated and financed by the same employer who pays the pension that has already replaced the wages of the benefit recipient.

The validity of the concept of integration of pension plan retirement benefits with workers' compensation benefits is nowhere better expressed than in *Renshaw* v. *U.S. Pipe & Foundry Co.*, 30 N.J. 458, 153 A.2d 673 (1959), where the Supreme Court of New Jersey[51] upheld the offset of workers' compensation benefits against a pension

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[50] That workers' compensation benefits may include benefits not clearly or directly related to wage loss—such as reimbursement for medical expenses and statutory awards for the loss of a member—affords no basis for distinction. Medical expense benefits are expressly excluded from integration, see Rev. Rul. 78-178, *supra*, and p. 31, *supra*. Statutory awards, excluded in the facts of Rev. Rul. 68-243, are not properly an exception to the wage-replacement nature of workers' compensation. *See* Larson, *op. cit.*, *supra*, n. 47, at 33. In any event, neither type of benefit is included in the GM Pension Plan integration formula.

[51] Quoting the observations of Professor Larson set forth in n. 48, *supra*, and concurring generally in his approval of the concept of nonduplication of wage-loss benefits.

plan normal retirement benefit, both payable to an employee following his retirement at age 65, under a provision similar to Section 2 of Article IV of the GM Pension Plan, the court stating:

> "What the plan actually amounted to, and no more, was a commitment by the company to see that each retired employee received a fixed amount of money monthly, to compensate partially for wages lost through inability to continue employment by reason of age, and that if such was not forthcoming in whole or in part from the specified sources, *i.e.*, public pension, other pension contributed to by the company, social security benefits, private or statutory severance pay and the like, workmen's compensation benefits from the company or any other employer or public disability pension, it would pay the computed amount or any deficiency. The scheme had no particular relation to compensation benefits. Its scope was much broader and the theory an infinitely deeper one.
>
> "Moreover, it was no unilateral or gratuitous undertaking, but an agreement collectively bargained for and reached between the employer and the exclusive agent of the employees as part of a basic labor contract. . . .
>
> "We see no public policy question involved, and so no violation thereof, in any such design of a private, contractual pension plan or the particular provision before us. Plaintiff's position would seem to be equally assertive against decrease in the pension by the amount of social security payments or any of the other specified deductions. We find nothing to warrant concluding that workmen's compensation payments should be in any different or more insulated category." 30 N.J. at 467-68, 153 A.2d at 678-79.

It is noteworthy that the New Jersey Supreme Court engaged in the same reasoning as the Internal Revenue Service did, almost a decade later, in Rev. Rul. 68-243—reason-

ing since adopted by other courts to which the issue has been presented.[52]

What *Renshaw* makes abundantly clear is that, contrary to the arguments urged upon this Court by petitioners and appellants, there is nothing inherent in the nature of workers' compensation benefits that precludes a private pension plan, including specifically one arrived at through collective bargaining, from taking such benefits into account in determining normal retirement benefits payable under the plan, including the characterization of the workers' compensation benefits either entirely or partially as in the nature of wage replacement. Indeed, the fact that the *Renshaw* court upheld the offset despite its analysis of New Jersey workers' compensation benefits as involving more than wage loss[53] should be sufficient to dispose of the arguments of petitioners and appellants and the allusions of *Utility Workers* on that issue.

In fine, the workers' compensation benefit offset provided for in Article IV, Section 2 of the GM Pension Plan

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[52] *E.g., Soper* v. *St. Regis Paper Co.,* 411 A.2d 1004, 1009-10 (Me. 1980); *Fielder* v. *Travelers Insurance Co.,* 79 Mich. App. 449, 263 N.W. 2d 9 (1977); *Paterson* v. *Southwestern Bell Telephone Co.,* 411 F.Supp. 79 (E.D. Okla. 1976); *Williams* v. *Insurance Co. of North America,* 150 Mont. 292, 434 P. 2d 395 (1968); *Fultz* v. *Union Carbide Corp.,* 219 Tenn. 345, 409 S.W. 2d 541 (1966); *Parsons* v. *Granite City Steel Co.,* 41 Ill. App. 2d 396, 190 N.E. 2d 644, 646-47 (1963). No cases *contra* have been found involving private pension plans. The cases cited in Brief of Petitioners 40-41 n. 4 are inapposite: *City of Lincoln* v. *Steffensmeyer,* 279 N.W. 2d 272 (Neb. 1938), involved construction of a public pension statute; *Lumsden* v. *Despatch Shops, Inc.,* 5 A.D. 2d 242, 171 N.Y.S. 189 (1958), held merely that receipt of a pension did not defeat the employee's right to workers' compensation, an issue entirely different from that here.

[53] The accuracy of the assumption is open to question. *See* Larson, *op. cit. supra,* n. 47, at pp. 33-34. The attempt of New Jersey Legislature to change the policy enunciated in *Renshaw* is, of course, irrelevant to the issue herein, which involves a question of purely federal law that cannot be affected by any change in the law of a single State.

is consistent with the policy underlying workers' compensation as enunciated by the courts in the States in which the question has arisen. It has been an inherent part of permitted and approved private pension plan benefit structure for more than a dozen years. Code §401(a)(5), under which it has been expressly approved, is today as it was prior to ERISA. The permissibility of the offset has been reaffirmed since ERISA. It is fully consistent with the Treasury Department's regulation on the subject, 26 C.F.R. §1.411(a)-4(a). Finally, all of the foregoing are consistent with the structure, statutory antecedents, and legislative history of ERISA. It is respectfully submitted, therefore, that the holding of the Third Circuit below that Article IV, Section 2 of the GM Pension Plan is lawful under §203(a) of ERISA[54] should be affirmed by this Court.

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[54] *Amici curiae* Merl D. Stong, *et al.*, premise their brief on ERISA §403(c)(1), 29 U.S.C. §1103(c)(1), which provides generally that "the assets of a plan shall never inure to the benefit of any employer." This issue was not presented to the Third Circuit, and has not been presented to this Court, by either petitioners or appellants. Therefore, it is not properly raised by these *amici* and should not be considered herein. *Bell* v. *Wolfish*, 441 U.S. 520, 531 n. 13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960). In any event, the origin of ERISA §403(c)(1) lies in 1954 Code §401(a)(2), 26 U.S.C. §401(a)(2) (and, before it, 1939 Code §165(a)(2)). Thus, it is obviously coordinate with and of equal stature to Code §401(a)(5), the source of authority for workers' compensation benefit integration. Thus, if, as respondent submits, such integration is proper thereunder and under ERISA §203(a) and Code §411(a), Congress certainly could not have intended by ERISA §403(c)(1) to prohibit such integration (and, as well, social security and railroad retirement benefit integration which could be deemed equally unlawful under *amici's* reading of ERISA §403(c)(1)). *Dotson* v. *Saginaw Parts, Chevrolet Motor Division, General Motors Corporation*, Civ. No. 79-3728 (E.D. Mich. Dec. 11, 1980); *Spitzler* v. *New York Post Corp.*, 476 F.Supp. 386 (S.D.N.Y. 1979). The Third Circuit so recognized in note 13 to its opinion below (J.A.113 n. 13), in response to the issue as raised there by some of these *amici*.

II.

As applied to the GM Pension Plan, N.J. Stat. Ann. 34:15-29, as amended by Chapter 156 of the Laws of 1977, is an invalid attempted exercise of state power in an area expressly preempted by Congress under the Employee Retirement Income Security Act of 1974.

The remaining issue arises by reason of the enactment by the New Jersey Legislature, on July 14, 1977, effective immediately, of Chapter 156 of the Laws of 1977, which amended N.J. Stat. Ann. 34:15-29, part of the New Jersey Workers' Compensation Law, to include a provision that:

> "The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments."

Respondent submits, as it did below, that to the extent Chapter 156 purports to apply to the GM Pension Plan, it represents an invalid attempted exercise of power by the New Jersey Legislature in an area preempted by Congress through the enactment of ERISA and by its express terms, and is, therefore, ineffective under the Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, §2.

It is unquestioned that Congress has the power to occupy a field and preempt completely application of State law under the Supremacy Clause. In *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141-42 (1963), this Court summarized the three grounds upon which a state statute will be deemed preempted by Federal law:

(1) if "the Congress has unmistakably so ordained";[55]

(2) if "the nature of the regulated subject matter permits no other conclusion"; or

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[55] To the same effect is *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

(3) if "the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[56]

GM submits that any of the three preemption tests as stated by this Court mandates the conclusion that Chapter 156 has been preempted by ERISA in its application to the GM Pension Plan.

Where applicable, the first test—that of express preemption by Congress—is the most readily applied test. It is applicable here. In the case of ERISA, Congress has "unmistakably ordained" its supremacy in §514(a), 29 U.S.C. §1144(a), which provides that:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975."

That the GM Pension Plan is "an employee benefit plan described in section 4(a)" is clear, since that provision applies to any employee benefit plan established or maintained by any employer engaged in commerce or in any activity affecting commerce. There is no question that GM is such an employer and the GM Pension Plan such a plan.[57] Neither does the GM Pension Plan fall into any of the classes of employee benefit plans "exempt un-

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[56] Citing *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

[57] To the extent that Chapter 156 may have been intended, as the intervenor suggests (Brief of Intervenor 5), to resolve the problems posed by *Conklin* v. *Board of Trustees of Police & Firemen's Retirement System*, 135 N.J. Super. 131, 342 A.2d 872 (App. Div. 1975), *rev'd*, 73 N.J. 198, 373 A.2d 996 (1977), and *Leoni* v. *Township of Hamilton*, 134 N.J. Super. 231, 339 A.2d 222 (App. Div. 1975), preemption by ERISA would leave it unaffected, as those cases relate to governmental pension systems, to which neither ERISA nor its preemptive effect applies.

der section 4(b) of ERISA."[58] The sole inquiry, then, is whether Chapter 156 is a state law that "relates to" the GM Pension Plan.

Once again starting from the literal statutory language, it is difficult to conceive of how Chapter 156 can be said *not* to "relate to" the GM Pension Plan. If permitted to be applied to the GM Pension Plan, it would prohibit the application of Article IV, Section 2 of the GM Pension Plan insofar as it applies to the payment of nondisability retirement pensions to pensioners to whom New Jersey would apply its statute. So viewed, it has a direct impact upon the benefit structure of the GM Pension Plan and thus most intimately "relates to" it.

Although conceding that Congress "must have intended by that language to occupy the entire field of pension plan law to the exclusion of all state regulation," and that "the New Jersey statute undoubtedly 'relates to' pension plans in the broadest dictionary sense of that term," the district court below declined to hold that Chapter 156 "'relates to' pension plans within the meaning of ERISA, 29 U.S.C. §1144(a)," essentially because it "is in no way concerned with pension plans *qua* pension plans," being "solely concerned with protecting the employee's right to workers' compensation disability benefits" (J.A.65a-66a). Petitioners and appellants essentially adopt that view in their argument to this Court.

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[58] The State of New Jersey, intervening below, contended at the outset that the GM Pension Plan is exempt under §4(b)(3) of ERISA, 29 U.S.C. §1003(b)(3), and, therefore, not affected by §514(a). Section 4(b)(3) excludes an employee benefit plan from the provisions of Title I and, therefore, §514(a), only if "such plan is maintained *solely for the purpose of complying with* applicable workmen's compensation laws or unemployment compensation or disability insurance laws" (emphasis added). Petitioners concede (Brief of Petitioners 44) the inapplicability of this provision to the GM Pension Plan, which is in no wise maintained for the purpose of complying with any such law, let alone *solely* for that purpose.

The Third Circuit saw no difficulty in carrying out what Congress "must have intended." The mere fact that the purposes of the state and federal law may differ is irrelevant in assessing the preemptive effect of federal law. *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra. See also Local 24, International Brotherhood of Teamsters, etc.* v. *Oliver,* 358 U.S. 283, 297 (1959). Nor does the fact that a workers' compensation statute is involved immunize it against preemption. *DeCanas* v. *Bica,* 424 U.S. 35 (1976), cited for its *dictum* by petitioners,[59] was concerned solely with preemption by implication, not, as here, preemption "unmistakably ordained."[60]

Neither does the §4(b)(3) exclusion of plans "maintained solely for the purpose of complying with applicable workmen's compensation laws"—admittedly inapplicable to the GM Pension Plan[61]—show any special deference in the area of preemption. To the contrary, the §4(b)(3) exclusion merely confirms the full subjection to §514(a) of plans *not* excluded by §4(b)(3). Were the intent of Congress otherwise, it would be expressed in a §514(b) exception. In any event, although Chapter 156 amended the New Jersey Workers' Compensation Law, it is clear that it has no direct effect whatsoever upon statutory benefits thereunder; nor is its impact upon private pen-

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[59] Brief of Petitioners 44.

[60] In his opinion for the Court in *De Canas* v. *Bica, supra,* 424 U.S. at 357-58, Justice Brennan noted that:

> "Respondents . . . fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular."

In contrast, §514(a) expressly demonstrates the intent of Congress to preclude "even harmonious state regulation touching on," *i.e.,* "relating to," pension plans subject to ERISA.

[61] See n. 58, *supra.*

sion plans merely incidental or collateral. On the contrary, Chapter 156 applies only to employers who maintain private pension plans and only as against benefits thereunder.

Moreover, it is clear on the face of §514 that Congress did not intend to limit itself to the preemption of only those state actions which directly affect employee benefit plans, as distinguished from those which only indirectly affect such plans. This is seen in §514(c)(2), 29 U.S.C. §1144(c)(2), which provides that:

> "(2) The term 'State' includes a State, or any political subdivision thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.*" Emphasis added.

It is also seen in §514(b)(4), 29 U.S.C. §1144(b)(4), which expressly excepts from §514(a) "any *generally applicable* criminal law of a state" (emphasis added). As pointed out in *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin,* 599 F.2d 205, 207 (7th Cir. 1979), *cert. denied,* 444 U.S. 1031 (1980):

> "This provision indicates an intention that the word 'relate' extend even to laws of general applicability (as well as an intention to preempt criminal statutes limited in application to welfare benefit plans). The exception would otherwise have been unnecessary."

The original House and Senate versions of the bill that ultimately became ERISA, H.R. 2, 93d Cong., 1st Sess. (1973), would have limited federal preemption to areas expressly regulated by ERISA, *i.e.,* to areas of conflicting or duplicate state law.[62] However, the Conference Com-

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[62] The House version, §514 of H.R. 2, 93d Cong., 1st Sess. (1973), actually enumerated the specific areas of federal preemption:

(Footnote continued on following page)

mittee rejected that approach in favor of applying the principle of preemption in its broadest and most comprehensive sense. This is expressly stated in the Conference Report:

> "Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate

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(Footnote continued from preceding page)

> "It is hereby declared to be the express intent of Congress that . . . the provisions of part 1 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies . . . [and] that the provisions of parts 2, 3, and 4 of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the nonforfeitability of participant's benefits in employee benefit plans described in section 201(a) or 301(a), the funding requirements for such plans, the adequacy of financing of such plans, portability requirements for such plans, or the insurance of pension benefits under such plans." 120 Cong. Rec. 4742, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4057-59.

The version of H.R. 2 approved by the Senate on March 4, 1974, limited federal preemption to the subject matters expressly regulated by the bill:

> "Sec. 699. RELATIONSHIP TO STATE LAWS
>
> "(a) PRE-EMPTION OF STATE LAWS.—It is hereby declared to be the express intent of Congress that . . . the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act. . . ." 120 Cong. Rec. 5002, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 3820.

commerce." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 383 (1974), III Leg. Hist., at 4650.

In introducing the Conference Report, Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, made what must stand as the clearest and most unequivocal statement of the intention of Congress in §514(a) in the following terms:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. *This principle is intended to apply in its broadest sense* to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29933, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4745-46; emphasis added.

This was echoed by Representative Dent, Chairman of the Subcommittee on Labor of the House Committee on Labor Education, who stated:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. . . . *The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans.* Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under code of law—which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b)." 120 Cong. Rec. 29197, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4670-71; emphasis added.

Thus, not only is the express language of §514(a) the broadest possible that could be chosen, but all of the satements in the Conference Report and the accompanying statements of the proponents of the legislation clearly indicate that the use of such broad language was quite deliberate.[63]

Under the circumstances, it is not the least surprising to note the ever-growing list of court of appeals decisions striking down one or another state attempt at legislation relating to and affecting employee benefit plans, *e.g.*, *Standard Oil Co.* v. *Agsalud*, —— F.2d ——, 318 BNA Pens. Rep. D-1 (9th Cir. 1980); *Azzaro* v. *Harnett*, 553 F.2d 93 (2d Cir. 1977), *aff'g without opinion* 414 F.Supp. 473 (S.D. N.Y. 1976), *cert. denied*, 434 U.S. 824 (1977); *Pervel Industries, Inc.* v. *Connecticut Commission on Human Rights & Opportunities*, 603 F.2d 214 (2d Cir.

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[63] In light of the present litigation, the statement made by Senator Jacob Javits, Ranking Minority Member of the Senate Committee on Labor and Welfare, explaining the reasoning of the Conference Committee in broadening the preemption provisions from those in the House and Senate versions of H.R. 2, is particularly worthy of note:

> "Both House and Senate bills provided for preemption of State law, but . . . defined the perimeters of preemption in relation to the areas regulated by the bill. *Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.*
>
> "Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, *the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exception—the displacement of State action in the field of private employee benefit programs.*" 120 Cong. Rec. 29942, 93d Cong., 2d Sess. (1974), III Leg. Hist., at 4770-71; emphasis added.

1979), *aff'g without opinion* 468 F.Supp. 490 (D. Conn. 1978), *cert. denied,* 444 U.S 1031 (1980); and *see Wadsworth* v. *Whaland,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978); *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin, supra,* 599 F.2d at 208-10.[64]

In an effort to show an exception to the breath of §514 (a), petitioners cite *American Tel. & Tel. Co.* v. *Merry,* 592 F.2d 118 (2d Cir. 1979), where the court held that ERISA does not preclude enforcement of a state court support order against the pension of a divorced retiree. However, that holding requires no exception to §514(a), but the construction of §206(d)(1) of ERISA, 29 U.S.C. §1056(d)(1)—joined in by the Secretaries of the Treasury and Labor[65]—as permitting the payment of benefits under a pension plan to fulfill marital or other intrafamilial obligations as an exception to the general prohibition of the assignment or alienation of benefits. To the extent Congress is deemed, in ERISA §206(d)(1), to have authorized the application of pension benefits to such intrafamilial obligations, the mere fact such obligations arise under state law is irrelevant to their enforcement and raises no true question of preemption.[66]

Petitioners' reliance on the decision of this Court in *New York Telephone Co.* v. *New York State Dept. of*

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[64] *Wadsworth* v. *Whaland* and *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin, supra,* though actually holding against preemption, did so on the basis of specific statutory exceptions, after strongly enunciating the principle of broad construction of §514(a).

[65] *See American Tel. & Tel. Co.* v. *Merry, supra,* 592 F.2d at 125.

[66] *Stone* v. *Stone,* 632 F.2d 740 (9th Cir. 1980), arrived at the same result as *American Tel. & Tel. Co.* v. *Merry, supra,* in a community-property context, by treating the wife as a participant with standing to assert a claim to benefits under the plan, relying upon this Court's dismissal of the appeal in *In re Marriage of Campa,* 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed,* 444 U.S. 1028 (1980).

Labor, 440 U.S. 519 (1979), is no less misplaced, although for different reasons. The question presented there, as stated by the Court, was "whether the National Labor Relations Act, as amended, *impliedly* prohibited the State of New York from paying unemployment compensation to strikers." 440 U.S. at 522; emphasis added. Further in its opinion, the Court noted that: "Pre-emption of state law is sometimes required by the terms of a federal statute [citation omitted]. This, of course, is not such a case." 440 U.S. at 540. To leave no doubt, the Court concluded its opinion with the statement that "a State's power to fashion its own policy concerning the payment of unemployment compensation is not to be denied on the basis of speculation about the *unexpressed* intent of Congress." 440 U.S. at 545; emphasis added.

Further, the Court, as it made clear throughout its opinion, was concerned with what was basically a question of accommodating two *federal* statutes contemporaneously enacted—the National Labor Relations Act and the Social Security Act—state law being involved only by virtue of authority delegated to the States by the latter statute. Here, in contrast, there is no question of accommodating the policies of two federal statutes; only one, ERISA, is involved. Moreover, the question here is not one of *implicit* preemptions; there is no need to speculate about any *unexpressed* intent of Congress. In §514(a) of ERISA, Congress has *expressly* ordained preemption without requiring or even permitting inquiry into the purpose of the state legislation.

Indeed, even if that were not the case, it necessarily follows, assuming this Court agrees, as submitted in Point I, *supra,* that ERISA §203(a) codifies and authorizes the pre- and post-ERISA Treasury sanction of workers' compensation benefit integration in pension plans, that Chapter 156 then "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz, supra,* 312 U.S. at 67. The entire genius of ERISA was that there be a single source

of governing law for pension plans, rather than fifty or more separate systems governing the operation of such plans.[67] If New Jersey is permitted, by Chapter 156, to establish for the GM Pension Plan and pension plans like it one rule applicable to New Jersey pensioners and an entirely different rule applicable to those in every other State in which the employer does business and maintains its pension plan, there is nothing to prevent every other State from adopting a similar—or, worse yet, slightly different—rule within its borders. The result would be a crazy-quilt of conflicting state regulation in which no pension plan would have the same benefit structure and the same meaning in any two States.[68] It is respectfully submitted that such a result cannot be countenanced and is not to be countenanced under the Supremacy Clause of the Constitution.

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[67] The Committee on Education and Labor of the House of Representatives, pursuant to an express delegation of authority in ERISA §§3021 and 3022, 29 U.S.C. §§1221 and 1222, reaffirms in its "oversight" report the intentionally broad scope of preemption under ERISA §514(a). See H.R. Rep. No. 94-1785, 94th Cong., 2d Sess., at 46-48 (1976).

[68] That the circumstances under which workers' compensation benefits and the amount of such benefits depend upon state law does not constitute an exception to preemption under ERISA §514 (a), contrary to the suggestion of appellants in *Alessi* (Brief for Appellants 44-45). Obviously, state law is relevant only insofar as it creates the facts upon federal law operates.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Third Circuit remanding this cause to the United States District Court for the District of New Jersey for the entry of judgment for respondent should be affirmed by this Court.

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No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

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No. 80-193

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REPLY BRIEF OF PETITIONERS

I. ERISA prohibits the forfeiture of vested retirement benefits by workers' compensation awards.

The enactment of ERISA was a major reformation of pension law in the United States. Its primary purpose was the protection of employees' and pensioners' rights to receive the pension benefit to which they were entitled. Congress' investigation into the pre-ERISA status of pensions produced evidence not only of abuses affecting a great number of people, but also of many *types* of abuses.[1] The multitude of abuses and the great variety of how those abuses were effected led Congress to enact ERISA to insure that people's rights to receive their pensions were secured. Necessarily inherent in the solution to the problem Congress sought to remedy was a broad proscription against forfeiture of vested retirement pension benefits. Congress was not unaware of the breadth of the forfeiture proscription: those practices it deemed to be desirable were expressly authorized in the statute and allowed to continue. Due to the broad, proscriptive nature of ERISA, which was intended to give broad protection to pensioners' rights, only the express exceptions found in the statute are consistent with the statute.

Respondent, appellees and their various *amici* consistently accuse petitioners and appellants of maintaining a flawed argument, which they conveniently reduce to a simplistic syllogism.[2] Respondent and appellees attempt to characterize the dispute as follows: ERISA §203(a), 29 U.S.C. §1053(a), broadly prohibits all forfeitures of vested pension benefits except those expressly allowed in §203(a)(3). A deduction against pensions for workers' compensation awards is not an express exception and therefore such a deduction is prohibited. Respondent and

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[1] ERISA §2(a); 29 U.S.C. §1001(a).

[2] Brief of Respondent at 7, 15; Brief of Appellees at 2-3; Brief of the United States at 8, 13; Brief of Steel Companies at 14, 19; Brief of ERIC at 5; Brief of Chamber of Commerce of the U.S. at 5.

appellees then argue that the syllogism is flawed because it cannot account for Congress' separate approval of Social Security and Railroad Retirement benefit deductions. They account for this separate approval by claiming that minimum vesting standards were not meant to apply to the defined benefit determined under the plan. It is then claimed that legislation and administrative practice antecedent to ERISA indicate that workers' compensation awards are disability benefits so similar to Social Security disability benefits and Railroad Retirement disability benefits that Congress intended to permit a workers' compensation offset.

It is, of course, always easier to defeat the arguments we would like our enemies to make, than cope with reality.

A. ERISA especially §203(a) bars the offset of workers' compensation awards from vested retirement benefits.

The first error made by respondent and appellees is that only §203(a) prohibits a workers' compensation forfeiture. In fact, petitioners and appellants have consistently argued that not only does §203(a)[3] prohibit the pen-

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[3] Respondent correctly asserts that ERISA §203 became effective vis-a-vis the GM Plan on October 1, 1976, but has erroneously concluded that said section does not apply to forfeitures with respect to individuals retiring before that date (Brief of Respondent at 6, n.1). While citing *Fremont* v. *McGraw-Edison*, 606 F.2d 752 (7th Cir., 1979) and *Dotson* v. *Saginaw Parts*, Civ. No. 79-73728 (E.D. Mich., 1980), as supporting its position, respondent has ignored the line of cases supporting the proposition that it is the date of the forfeiture which determines the applicability of ERISA §203.

See, e.g. *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir., 1976), on remand 452 F.Supp. 117 (S.D.N.Y., 1978), aff'd 586 F.2d 968 (2d Cir., 1978) holding that where benefits were suspended, each month's denial constituted a separate forfeiture. The court found *Riley* to have a claim under ERISA from the date when its vesting provisions became applicable, even though he retired prior to the effective date. In *Morgan* v. *Laborers Pension*

(*Footnote continued on preceding page*)

sion forfeiture, but the entire statute does as well. Respondent and appellees all but concede that §203(a) prohibits the forfeiture, hence their reliance on 26 U.S.C. §401 (a)(5) to defeat the syllogism they have created.

IRS §401(a)(5), first enacted in 1942, permits pension benefit payments to "differ because of any retirement benefits created under State or Federal law." That Congress permitted "retirement" benefits created under law rather than 'all' or 'any' so created, is elementarily obvious. That the Treasury Department impermissably expanded the statute[4] by eliminating the word "retirement" and consequently reaching areas of which they were apparently ignorant, has not been addressed either.

If there is doubt about the construction of §401(a)(5)'s meaning to *limit* the types of benefits permissably used in allowing pension benefits to "differ" "under the plan", then it serves well to look for guidance *in the statute.* IRC

(Footnote continued from preceding page)

Trust Fund for Northern California, 433 F.Supp. 518 (N.D. Cal., 1977) the court held "to determine whether ERISA is applicable to plaintiff's claims, the court must determine if the denial took place after the effective date of the relevant provisions of ERISA." Petitioners submit that *Riley* and *Morgan* constitute the better line of reasoning. See also *Winer* v. *Edison Bros. Stores Pension Plan,* 593 F.2d 307, (8th Cir., 1979).

In *Keller* v. *Graphic Systems of Akron, Inc.,* 422 F.Supp. 1005 (N.D. Ohio, 1976), ERISA §203 was found inapplicable only because the forfeiture occurred prior to the effective date. Petitioners, in the instant case, are protected by §203 since the forfeitures of their pensions occurred after October 1, 1976. Should the Court find §203 not to hinge on the date of the forfeiture, but, rather, on the date of retirement, pre-1976 retirees will be stripped of the protection of ERISA.

In the event this Court finds petitioners herein not to be protected by §203 (due to the effective date), state law would apply. *Keller* v. *Graphic Systems of Akron, supra.* Chapter 156 of the New Jersey Laws of 1977 would then prohibit the offset.

[4] See Briefs of the United States: in the Supreme Court at 7, 11; in the Third Circuit Court of Appeals at 20.

§401(a)(15), and its ERISA counterpart, §206(b), 29 U.S.C. §1056, explicitly deals with the way in which Social Secuirty, the Federal government's mandatory program (and the most significant "retirement" income program in the country), and the Railroad Retiremnt Act (also a Federal program), may be used in determining benefits "under the plan". §401(a)(15), of course, prohibts "decreases" in pension payments if the Social Security retirement benefit "increases" while the pension is being paid. §401(a)(15) is a *limitation* on the use of Social Security retirement as an offset; it is consistent with a narrow construction of "retirement benefits" under §401(a)(5).

The Social Security Act provides that in order for an individual to qualify for disability benefits, one may not have attained the age of 65. 42 U.S.C. §423(a)(1)(B). At age 65 the recipient of disability is ineligible for the *disability* category of benefits and qualifies through the *retirement* benefit category. 42 U.S.C. §402(a)(3). In the case at bar, "normal retirement age" is 65 years. A plan participant could not have Social Security disability benefits offset against a normal retirement-age pension because Social Security disability would cease when the normal retirement-age pension became due. Only Social Security retirement benefits could be deducted from a normal retirement-age pension. This is consistent with the concepts of correlated and like benefits systems.[5] It cannot be seriously maintained that Congress intended Social Security disability benefits to be deducted from normal retirement-age pensions while Congress also made it an impossibility.

There is additional evidence to support the proposition that had Congress intended to permit workers' compensation offsets against retirement pensions it would have expressly provided for such. ERISA §203(a)(3)(B), a prime example of ERISA participation in the definition of the benefit under the plan, is an express exception to the

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[5] 26 C.F.R. §1.401-4(b).

nonforfeitability rule of §203(a) and allows suspensions of pension payments upon certain types of re-employment. If the re-employment terminates, benefit payments begin again. The workers' compensation forfeiture practiced by respondent and appellees operates in an analogous manner: during the period over which workers' compensation awards are paid, the pension benefit is forfeited in a dollar-for-dollar amount. When the forfeiture has been fully effected the pension payments begin again. Both the re-employment suspension and the workers' compensation forfeiture can be euphemistically characterized as 'integration of income to the individual'.

There is, however, at least one overwhelming difference between the offsets for re-employment and workers' compensation: Congress expressly authorized[6] the re-employment exception to the statute's rule of non-forfeitability.[7] Congress recognized that absent such an expression, offsets for re-employment would be forfeitures that violated §203(a)'s rule of non-forfeitability. Congress did not express a desire to similarly exempt workers' compensation from the rule of non-forfeitability, and certainly gave no statutory basis for it.

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[6] Similarly, Congress expressly provided by *statute*—the Railroad Retirement Act of 1974, 42 U.S.C. §231, *et seq.*—that Social Security Benefits would be offset with Railroad Retirement benefits. See also n.18, *infra.*

[7] Another example of the misuse of a phrase can be seen in Brief of Respondent at 24, n.35. The respondent makes note of a totally unrelated and obscure 1962 provision, 26 U.S.C. §401 (a)(7), which uses "nonforfeitability" in a plan termination context. Under the respondent's argument, "nonforfeitability" is invoked as a concept which was well known under pre-ERISA law. This is but another wholly isolated phrase which is being picked out of the hat by the respondents as a means to cloud the clear and unambiguous language and nonforfeitability requirements of ERISA.

B. The statute is paramount to Administrative Regulations, which must be consistent with the statue.

That there was no Congressional intent to provide corporations with a pension loophole for workers' compensation liability is evidenced in the fact that the Treasury Department denies the conclusion of Judge Garth's "legislative regulation" analysis.[8] Treasury's admission that T.Reg. 1.411(a)-4(a), which supposedly includes the result so blithely reached in Rev. Rul. 68-243, is not "legislative" but "interpretive"[9], only puts greater distance between 'Congressional intent' and the 'interpretive' reach of the agency. In essence Treasury admits that the inclusion of workers' compensation within the implied bounds of the regulation was not based on specific Congressional direction, but the agency's interpretation of the statute.

In fact, however, the Treasury admission makes suspect the Third Circuit's entire decision by denying the results of the Court's methodology. The Court extended the greatest deference to the regulation (which does not expressly approve the offset of workers' compensation), because it found the regulation to be legislative. The Court's deference, however, is clearly unjustified. The error was to begin the analysis with the regualtion, rather than the statute.

> "In determining the legality of the Workmen's Compensation offset, then, we must begin our inquiry of this regulation, which, if held to be valid would require us to sustain the offset provisions in the General Motors and Raybestos pension plans." (J.A. 99a)

Apparently, the Third Circuit was ready to decide the case without reference to ERISA.

The Sixth Circuit Court of Appeals did not make these errors in its opinion in *Utility Workers Union of America* v. *Consumers Power Company* No. 78-1402 (6th Cir., Jan.

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[8] J.A. 99a-101a.

[9] See Brief for the United States at 19 n.12.

6, 1981), aff'g 453 F.Supp. 447 (E.D. Mich. 1978), reconsideration en banc denied, (Feb. 13, 1981) when confronted with the identical problem.[10] There, the Court correctly realized that the statute was the primary source of law and began its analysis from there.[11] The Sixth Circuit[12] reached the conclusion that the offset of workers' compensation awards was not permissible under ERISA, where it held:

> "Workers' compensation benefits are paid soley because an employee has sustained an occupational injury within the course of his employment. Such injury is not only the event that triggers the payment of workers' compensation benefits; it is the sole source of the employee's entitlement to these benefits. Accordingly, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is not an offset that is in the nature of an offset for social security payments. That is, workers compensation benefits are not a part of 'an integrated and correlated retirement system' that properly includes pension benefits and social security benefits. To the contrary, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is an illegal forfeiture that is prohibited by the nonforfeitability provision of section 203(a) of ERISA, 29 U.S.C. §1053(a)." (18a)

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[10] 2a-3a.

[11] Cite to U.S. in A to RB (6).

[12] It should be noted that the decision of the Sixth Circuit in *Utility Workers,* effectively overruled the previous Michigan District Court decisions in *Pavlovic* v. *Chrysler Corp.,* Civ. No. 7-704-38 (E.D. Mich. Jan. 10, 1978); *Bordinc* v. *Evans Products Co.,* 453 F.Supp. 19 (E.D. Mich. 1978); and *Dotson* v. *Saginaw Parts,* Civ. No. 79-73728 (E.D. Mich. Dec. 11, 1980).

Similarly, the District Court in *Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company and Hawaiian Telephone Company* v. *Eleanor Pascoe, etl al.,* Civ. No. 78-0843 (D. Haw., Dec. 15, 1980)[13] began its analysis with statute. It held that:

> "Statutory language in ERISA and its legislative history, the compensatory nature of workers' compensation benefits and the clear policy to prohibit forfeitures except in certain specified instances convinces this Court that offsets of workers' compensation benefits as provided for under the pension plans constitutes a forfeiture under ERISA." (50a)

Even assuming the "legislative" character of T. Reg. §1.411(a)-4(a) as found by Judge Garth in his Opinion below, the regulation is not valid under the appropriate test for such a regulation as enunciated by Judge Garth in *Baker* v. *Otis Elevator,* 609 F.2d 686 (3rd Cir., 1979) and the decision below. The consequence of dropping the word "retirement" impermissably exanded the statute, making it a "clear and manifest conflict . . ."[14]

However, the Court in *Utility Workers* and the Brief of the United States characterize the regulation as 'interpretative', (therefore entitled to less deference than accorded below) and advocated a test of 'plain inconsistency.' Under such a test, the regulation is even more easily seen as contradictory to the statute.

If, however, the inconsistency is seen to be merely literal or superficial (rather than plain) and the regulation is deemed valid then the conclusion is inescapable that the impermissably expansive reach of the regulation occurs in its application to workers' compensation through Rev. Rul. 68-243. This was the result reached by the Sixth Circuit in *Utility Workers.*

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[13] Hereafter called *Hawaiian Telephone Company.*

[14] See also the discussion in *Hawaiian Telephone Company.*
RB].

C. Minimum vesting standards are applicable to the determination of a Pension Benefit.

Respondent and Appellees claim that the minimum vesting standards are separate from and inapplicable to a private plan's determination of the specific dollar amount of pension benefit paid to an individual retiree.[15] They construct a rationale of "benefit definition" or "accrual" obtained "under the plan" to support the proposition that ERISA's §203 was not meant to apply to the dollar amount determined under the plan. Emphasis is placed on the word "claim" in ERISA §3(19) 29 U.S.C. §1002 and its importance in the case of *Nachman Corp.* v. *P.B.G.C.*, 446 U.S. 359 (1980) and the role of collective bargaining and corporate rights in establishing the levels of payouts. The fallacy in this argument is that §203 most definitely effects the dollar amount of pension benefit to be paid; it directly participates in the "benefit definition". It is wrong, as Respondent argues, that the benefit is first determined and minimum vesting standards are then applied.[16]

ERISA, of course, does not dictate a specific dollar amount to be paid. Rather, ERISA sets forth mandatory guidelines with which plans must comply. Some of these guidelines are particularly applicable as to what factors (and to what extent) a plan may or may not use in the *formula* which determines the benefit amount. What is lawfully negotiated by the parties to a plan is the particular monetary amount used in the formula. An individual worker retires with a particular amount of credited years of service and this numerical amount is also used in the formula that determines the specific amount of the pension. Other factors are part of the formula that produces the specific pension amount. IRC §401(a)(15), for instance, dictates to what extent Social Security benefits

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[15] Brief of Respondent at 5, 9 n.6, 11, 15; Brief of Appellees at 4-5; and particularly the Briefs of ERIC and National Steel Corporation.

[16] See Brief of Respondent at 9.

may be used as an offset. The Social Security benefit at the time of retirement, a level established independently of plan benefit levels, directly effects the benefit specifically paid by the fund.

However, one need not look further than §203(a) itself to recognize that minimum vesting standards directly effect, by their participation in the benefit formula, the specific dollar amount of the pension. §203(a)(3)(B) is, perhaps, the clearest example of such participation by establishing the extent to which a plan may forfeit vested benefits due to re-employment. It clearly is an active factor in the determination of what actual benefit is to be paid. §203(a)(2)(A) is another example of the minimum vesting standards effecting the specific benefit paid. It requires 100 percent vesting after 10 years of service, and consequently is integral to the benefit formula structure by setting a maximum length of time (10 years) before pensions must fully vest. Other parts of §203(a) can also be seen as statutory parameters to the benefit formula. It cannot be realistically stated that ERISA §203 leaves the determination of benefits solely "under the plan". ERISA most definitely participates in what specific dollar amount must be paid under the plan. If there is any real consequence in the right to a vested benefit, it is the actual receipt of the full, vested benefit. Otherwise, a right to a claim is meaningless.

The purpose of respondent's and appellees' attempt to artificially deny ERISA §203's applicability to 'benefit definition under the plan' is to allow the (obfuscatory) argument that workers' compensation benefits are so similar to Social Security benefits that they are included within the statutory exception providing for the Social Security and Railroad Retirement offset.

Respondent and appellees attempt to create a conceptual underpinning for the pre-ERISA IRS treatment of workers' compensation and pensions by bootstrapping workers' compensation awards to Social Security disability benefits. Indeed, the *Buczynski* Court found any distinc-

tion between the two to be "meaningless". The *Utility Workers* court, perhaps more cognizant of the real-life functions these very different programs actually fulfill, did not make the same mistake. The Sixth Circuit, by recognizing the fundamental difference between the two types of benefits found that the regulation in question was unlawfully applied by attempting to encompass workers' compensation awards.

Besides the fact that Social Security disability benefits cannot be integrated with normal retirement age pensions due to the structure of the Social Security Act (see *supra*), Social Security disability benefits are so fundamentally different from workers' compensation awards that the latter cannot be honestly likened to the former for the purposes of ERISA. The semantic confusion of the word "disability" when interchanged as a generic term and a term of statutory (or regulatory) art, cannot obscure the actually distinct natures of these programs.[17]

Social Security disability benefits are payable only to persons who cannot "engage in any substantial gainful activity" as a result of the injury 42 U.S.C. §423(d)(1). The disability need not arise in the course of employment. Whereas workers' compensation protection attaches at the first minute of employment, regardless of age, a person is not eligible for Social Security disability benefits unless a certain period of time has been worked in covered employment and the person is older than a minimum age. Workers' compensation awards serve to protect a class of injured persons (employees) that cannot qualify for Social Security disability—employees who suffer from injuries (compensable under workers' compensation) that are anything less than the Social Security disability qualifying standard.[18]

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[17] Another example of the semantic confusion sewn by respondent and appellees is in their use of the word "integration" as a euphemistic label for forfeiture.

[18] The fact that Social Security disability partially overlaps with workers' compensation does not mean the two programs serve

(Footnote continued on following page)

Retirement pensions are similar neither to Social Security disability benefits nor workers' compensation awards. Pensions are wages for work already performed, the payment of such wages being deferred until the employment ceases. The pension amount is the product of a dollar rate and the length of time worked. The normal wage structure is the relation of a rate of pay (hourly, weekly, etc.), to the length of time worked in order to determine the amount of wages to be paid. The identicality of the structures of normal wages and pensions is no surprise given their common derivation from work performed.

Respondent and appellees make the preposterous argument that pensions are not deferred wage payments, but only a guarantee of a maximum income level during retirement years, no matter what the source of the income.[19] Because of the bloated meaning attached to 26 C.F.R. §1.411(a)-4(a) any benefit created under law could be permissably "integrated" with pension plans, regardless of its source, purpose or character.[20] This would conceivably include such payments as Veterans Administration benefits (which can provide retirement and disability pay), state welfare benefits (for which a pensioner could certainly qualify) or even state-run lottery winnings. Respondent's and appellees' intimation that a private reitrement pension is only a guaranty of an old-age income level, in fact, is only a formulation of the idea that a corporation can

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(Footnote continued from preceding page)

the same purpose. Social Security, by providing disability coverage to a broader class than is covered by a workers' compensation determination of 100% total, permanent disability, is expressly authorized by statute (42 U.S.C. §424a) to take an offset of up to 80% of the workers' compensation award. This is a correlated, like benefit system, authorized by statute and significantly, limiting in its nature.

[19] See particularly the Briefs of Appellees and Steel Companies.

[20] Brief of Respondent at 30-36; Brief of Appellees at 14-16.

limit retired workers' income to a specific pension benefit. The plan would use every dollar available under every benefit system created under law to pay off its pension obligation. The corporation, which entered into an agreement to pay retirement pensions, would, therefore, be the last source to pay the pension benefit.

Respondent and appellees assert the equally preposterous proposition that the New Jersey Workers' Compensation Act is not an act providing compensation for work-related injuries, but is premised on a 'wage loss' or 'wage replacement' theory.[21] A 'wage replacement' characterization serves to substantiate the argument that workers' compensation awards are sufficiently similar or 'correlated' to retirement pensions. This is a factually incorrect characterization. The 'wage loss' premise of a workers' compensation program is not the underpinning of the New Jersey program. See *Renshaw* v. *U.S. Pipe and Foundry Co.*, 30 N.J. 458 (1959) and *Dudley* v. *Victor Lynn Lines, Inc.*, 32 N.J. 479 (1960).

What respondent and appellees are incapable of overcoming is the reality that compensation for *partial* permanent disabilities is awarded even where the injured employee has continued to work without any loss of work-time (compensation for time lost from work due to the injury is separately compensable). The same standards of disability are applied to all claimants, whether actively employed or retired. Workers' compensation claims during employment or within the first two years after employment are not deductable from either normal wages or pensions, both under the GM plan and under N.J.S.A. 34:15-29, which prohibits the offset of workers' compensation awards against retirement pensions (but not against disability pensions).

What is even more difficult for respondent and appellees to overcome is the position of the Treasury De-

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[21] Brief of Respondent at 31, 33; Brief of Appellee at 20-24.

partment expressed in footnote 13 in the Brief of the United States:

> ". . . to the extent that a workers' compensation award reimburses the worker for medical expenses *or provides fixed payments for bodily impairment* [as New Jersey's program undeniably does] the Commissioner does not permit such awards to be used to offset pension benefits . . ." (emphasis added)

D. Employers will accure a windfall should the workers' compensation forfeiture be held lawful.

Unabashedly present in the "under the plan" argument are the dual intimations that the GM plan *authorizes* the workers' compensation deduction, and, if the workers' compensation deduction is found unlawful, some kind of windfall, for which the employee did not bargain, will accrue to the pensioner.[22] Simultaneously, the employer, who claims he did not bargain for the increased liability, will incur additional plan funding costs due to past re-

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[22] Brief of Respondent at 33 n. 45, and Brief of Appellant at 21-22, makes note of 3 Larson, Workers' Compensation, §97.10, and its reference to duplicate payments. What the Plans failed to note is that this provision is merely a restatement of earlier editions and reflective of philosophy not in keeping with the subsequently passed Employees Retirement Income Security Act of 1974.

It should also be noted that a finding that the workers' compensation offset is unlawful will not result in the 'double-dip' situation faced by this Court in *U.S. Railroad Retirement Board* v. *Fritz*, 49 U.S.L.W. 4035 (Dec. 9, 1980). In that case, which is factually distinguishable from this one, there was a specific *statutory* prohibition against the concurrent receipt of Railroad Retirement and Social Security benefits under 42 U.S.C. §231 *et seq.*

liance on the offset.[23] Were it not for the prejudicial likelihood elicited by the mere recitation of such charges, refutation would be virtually unnecessary.

The study prepared for the Department of Labor on the precise issue of the impact of workers' compensation offsets on pension plans, found as follows:

> (1) The estimated number of affected pension plans 7,200 or 8.5% of defined benefits plans.
> (2) The estimated number of affected claims is 2,000 per annum or 0.006% of 32,320,000 participants in defined benefits plans.
> (3) The estimated average benefits to affected participants would be approximately $225.00 per month under plans with immediate benefit provisions, and about $340.00 per month under plans with deferred benefits which permit benefit accrual while disabled.
> (4) The estimated increase in annual pension plan contributions runs from 0.22% to only 0.24% of current pension costs.
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> Hays Associates Analysis of Pension Plan/Workers' Compensation Offsets. Final report, April 13, 1979, contract no. J-9-O-7-0065, p. iii.

The GM plan states ". . . a deduction [for workers' compensation] shall be made, *unless prohibited by law* . . ." The presence of this clause indicates that the parties to the agreement had, at least, some question as to the legality of the deduction well before ERISA was enacted.[24] Prior to a judicial determination of the deduction's lawfulness, and in the face of state laws and enunciated policies prohibiting the alienation of workers' compensation

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[23] Brief of Respondent at 23, n.33 and 38; Brief of Appellees at 4 and 30-31; Brief of Steel Companies at 32; Brief of National Steel Corp. at 2, 16-17; and Brief of ERIC at 3.

[24] Testimony of Hubert Clodfelter, Tr. p. 9, 1.22 to p. 10, 1.13; p. 13, 1.5 to 7.

awards, it cannot be truthfully stated that the contract clause in the GM plan definitively *authorizes* the deduction. The evident doubt shared by the parties as to the legality of the offset raises skeptical questions: Did the GM plan really rely on the offset as a component of the plan's funding? Was the status of pre-ERISA law (the tax code, the Treasury Department's regulations and revenue rulings) as clear or definitive as respondent and appellees now claim in their explanations of law preceding ERISA? Why did GM even initiate the clause, let alone acknowledge its questionable legality?

An examination of the record in this case reveals that the issue of possible economic impact upon the plan was not a subject of this litigation, nor was it an element in Judge Garth's decision. Clearly, GM's initiative to include the offset in the plan[25] was meant to and does chill the exercise of workers' compensation rights. There is no evidence that the GM plan's funding level was somehow actuarily or otherwise, dependent on the utilization of the worker's compensation offset. The first GM plan year after the effective date of §203, began October 1, 1976; there is no evidence that General Motors of New Jersey utilized the offset provision prior to 1977—the first year in which petitioners and other members of their class suffered the offset.

The windfall, alleged by respondent and appellees, in fact exists, but the petitioners and appellants would not gain it. Petitioners and appellants have been adjudicated as suffering from work-related injuries and awarded damages. Respondent and appellees were, of course, represented by counsel in those proceedings. Payment for the injury is the compensation for the bodily loss actually sustained. Money damages for these injuries are not repair or replacement, but compensation. There is no windfall to petitioners when they receive retirement pensions based on years of service and compensation for actual injuries.

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[25] See generally, Clodfelter testimony.

The windfall would belong to the employer if the offset is upheld. Employer funding would then be reduced by the amount of workers' compensation awarded. Plans which had never relied on the offset as part of the plan funding would conceivably be permitted to immediately forfeit pension payments of previously compensated retirees. The various states' compensation programs (as applied to pensioners) would be shams. All retired workers drawing retirement pensions would be deprived of compensation for occupational diseases and injuries.

II. Chapter 156 of the New Jersey Laws of 1977 is a valid exercise of State police power, not pre-empted by ERISA.

In its attempt to argue in favor of preemption of Chapter 156 of the New Jersey Laws of 1977, respondent cites several decisions "striking down one or another state attempt at legislation relation to or affecting employee benefit plans".[26] However, the respondent (and for that matter appellants and amici) have failed to cite a single preemption case involving a state workers' compensation statute. Respondent admits[27] that two cases it cites as standing for preemption, i.e. *Bucyrus-Erie Co.* v. *Department of Industry, Labor and Human Relations of Wisconsin,* 599 F.2d 205 (7th Cir., 1979), cert. denied 444 U.S. 1031 (1980) and *Wadsworth* v. *Whaland,* 562 F.2d 70 (1st Cir., 1977), cert. denied 435 U.S. 980 (1978) actually held against preemption. Therefore, respondent relies on said cases merely for dicta regarding section 514(a) of ERISA, 29 U.S.C. §1144(a). It is also noteworthy that the aforementioned cases involved "employee welfare benefit plans" under 29 U.S.C. §1002(1) as opposed to employee pension benefit plans under 29 U.S.C. §1002(2). Also involving

[26] Brief of Respondent at 46-47.

[27] Brief of Respondent at 47, n.64.

an "employee welfare benefit plan" was *Standard Oil of California* v. *Agsalud,* No. 79-1095 (9th Cir., October 15, 1980) wherein a state law requiring workers in the state to be covered by a comprehensive prepaid health care plan was held to be preempted.

The decision in *Azzaro* v. *Hartnett,* 414 F.Supp. 473 (S.D.N.Y., 1976) aff'd without opinion 553 F.2. 93 (2d Cir., 1977), cert. denied 434 U.S. 824 (1977), although inapposite, is instructive. *Azzaro* involved an inquiry by the New York State Insurance Department into the pension benefit statute of a plan participant. In finding preemption of the state law, the Court stated:

> ERISA offers full protection to the employee involved in this matter. The act provides that the administrator of an employee pension benefit plan must furnish to any participant or beneficiary who so requests a statement of his current status which includes the total benefits accrued. 414 F.Supp. at 475.

Contrary to the situation in *Azzaro, supra,* ERISA does not regulate workers' compensation for the petitioners herein, so preemption should not be found.

The only known decision regarding the validity of a state workers' compensation law under section 514(a) of ERISA is the recent decision in *The Employee Benefits Committee of the Retirement System of Hawaiian Telephone Co., et al.* v. *Pascoe, et al.,* Civ. No. 78-0483 (D. Hawaii, December 15, 1980.) This case involved a pension plan offset provision similar to those presently before this Honorable Court, as well as a section of the state workers' compensation statute[28] not unlike Chapter 156. That Court upheld the validity of the state law, saying:

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[28] Hawaii Rev. Stat. §386-9 (1976) reads,

> Contracting out forbidden. Except as provided in §386-78 (not relevant) no contract rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this Chapter.

> By including the offset provision in the plan and raising ERISA as support for the provision's validity, plaintiffs (pension plan) are attempting to accomplish indirectly what they cannot accomplish directly . . . The clear policy of the State . . . to prevent employers from taking any action to reduce their obligations to pay workers' compensation benefits bars any relief declaring that the offset is valid . . . (58a, 59a)

The Court further held that "(A)ny possible issue of federal preemption by ERISA of the state workers' compensation law is precluded by the language of ERISA" (Slip Opinion, n.26). The "language" referred to by said Court was that of section 4(b)(3) of ERISA, 29 U.S.C. §1003 (b)(3) exempting from ERISA coverage (and preemption) plans "maintained solely for the purpose of complying with applicable workers' compensation laws . . ." While respondent, appellant and their amici have cited a number of distinguishable preemption cases, they are faced with the reality that the only Court (other than the Court below) which has addressed a state workers' compensation law, in the context of preemption under ERISA, has upheld the validity of the state law.

Respondent glosses over the section 4(b)(3) exemption, stating that said exception is inapplicable here and shows no special deference in the area of preemption.[29] Appellants and amici completely ignore section 4(b)(3) of ERISA. Contrary to the assertion of respondent, it is clear that 4(b)(3), 29 U.S.C. §1003(b)(3) does show deference in the preemption area. Said exemption frees plans maintained for workers' compensation purposes from many of the requirements of ERISA, including preemption. It is inconceivable that Congress would have exempted pension plans maintained to comply with workers' compensation laws under ERISA coverage, while preempting the underlying workers' compensation statutes. If a plan is exempt because it is maintained to comply with a workers'

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[29] Brief of Respondent 42.

compensation statute, the workers' compensation statute itself must be exempt from preemption. Any other interpretation flies in the face of reason.

Two Courts of Appeals have held state laws in the area of familial support (like workers' compensation, a traditional area of the state police power) not preempted by ERISA. In both *American Telephone & Telegraph Co.* v. *Merry,* 592 F.2d 118 (2d Cir., 1979) and *Stone* v. *Stone,* 632 F.2d 740 (9th Cir., 1980), state court garnishments[30] of pension benefits were upheld against preemption challenges. Respondent attempts to avoid the preemption implication of these two decisions by reference to some implied exception to the anti-alienation requirements of section 206 of ERISA, 29 U.S.C. §1056. However, a reading of these decisions shows that the state laws were determined to only peripherally affect pension plans, thereby not being preempted by ERISA.[31]

Chapter 156 of the New Jersey Laws of 1977, a valid exercise of state police power, in an area (workers' compensation) traditionally within the sphere of state police power, *Decanas* v. *Bica,* 424 U.S. 351 (1976), is not preempted by section 514(a) of ERISA, 29 U.S.C. §1144(a).

CONCLUSION

Petitioners and the class of which they are members respectfully request this Honorable Court to find that ERISA prohibits the forfeiture of vested retirement pension benefits by the amount of a workers' compensation award obtained by a pensioner. Petitioners further request this Court to find that N.J.S.A. 34:15-29 is not pre-empted by ERISA.

Respectfully submitted,

MARC C. GETTIS
Counsel for Petitioners

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[30] A state court order is a "state law" under section 514(c) of ERISA, 29 U.S.C. §1144(c). Brief of Appellant 35, Brief of Respondent 43.

[31] See discussion in Brief of Petitioners at 49-50.

APPENDIX A

Opinion of the United States Court of Appeals for the Sixth Circuit in *Utility Workers of America* v. *Consumer Power Company*, No. 78-1402 (6th Cir. January 6, 1981); Rehearing Denied February 13, 1981

No. 78-1402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UTILITY WORKERS UNION OF AMERICA AFL-CIO, AND ITS MICHIGAN STATE UTILITY WORKERS COUNCIL, LEWIS J. TINKLEPAUGH, CLARENCE J. SEGORSKI, LEO LINGRAM, BURNELL CLOUGH, ROBERT YON, RAY ROGERS AND PAUL DE HATE,

Plaintiffs-Appellees,

v.

CONSUMERS POWER COMPANY, AND THE PENSION PLAN FOR EMPLOYEES OF CONSUMERS POWER COMPANY,

Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed January 6, 1981.

Before: ENGLE and KEITH, Circuit Judges, and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. ENGEL, Circuit Judge, (pp. 21-23) filed a separate dissenting opinion.

PECK, Senior Circuit Judge. There is a single question presented by the appeal now before the Court: do the non-forfeitability provisions of the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1053(a), prohibit the reduction of pension benefits by the amount that a pen-

sioner receives in workers' compensation insurance benefits? Although this question appears simple, it in fact raises several difficult issues of statutory interpretation. Not only is the Court required to interpret various provisions of ERISA (in conjunction with related provisions of the Internal Revenue Code of 1954 [IRC], 26 U.S.C. § 1 *et seq.*), the Court also is required to analyze the nature of the workers' compensation benefits that are provided by state law.

At the outset, we note that the question on appeal has recently engendered conflicting decisions in several federal courts. For example, in the United States District Court for the Eastern District of Michigan (the district in which the present action was decided), the exact question before us has now been addressed on four separate occasions. In *Bordine* v. *Evans Products Co.*, 453 F. Supp. 19 (E.D. Mich. 1978); *Pavlovic* v. *Chrysler Corp.*, Civ. No. 7-70438 (E.D. Mich. January 10, 1978); and *Carlson* v. *Bundy Manufacturing Co.*, Civ. No. 6-72274 (E.D. Mich. August 18, 1977), the district court upheld the validity of the so-called "workers' compensation offset" (*i.e.*, the reduction in pension benefits by the amounts that pensioners receive in workers' compensation benefits). Judge Philip Pratt, the district judge in the present case, wrote the *Carlson* decision; however, in his opinion herein reviewed, Judge Pratt, with exemplary candor, reconsidered his reasoning in *Carlson* and reached the opposite result. In the present action, Judge Pratt entered summary judgment in favor of plaintiffs, and held that the reduction in pension benefits by the amount that a pensioner receives in workers' compensation benefits is a forfeiture that is prohibited by the non-forfeitability provisions of ERISA. *See Utility Workers Union* v. *Consumers Power*, 453 F. Supp. 447 (1978). Shortly after Judge Pratt issued his opinion in the present case, two decisions of the United States District Court for the District of New Jersey expressly followed his reasoning therein. *See Buczynski* v. *General Motors Corp.*, 456 F. Supp. 867 (D.N.J.), *rehearing denied*, 464 F.Supp. 133 (1978);

Alessi v. *Raybestos-Manhattan, Inc.*, CA No. 78-0434 (D. N.J. February 15, 1979). However, on appeal, both of these cases were reversed by the Third Circuit Court of Appeals, on the ground that Congress gave its implicit approval to workers' compensation offsets in various ERISA provisions. Based on this holding, the Third Circuit concluded that ERISA pre-empted a New Jersey statute that expressly prohibited pension plans from incorporating workers' compensation offsets. *See Buczynski* v. *General Motors Corp.*, 616 F.2d 1238 (3d Cir.), *cert. dismissed sub. nom. Alessi* v. *Raybestos-Manhattan, Inc.*, — U.S. —, 101 S.Ct. 25 (1980).

We have heard oral argument in the present case, and have reviewed the lengthy and comprehensive briefs that have been submitted by the parties and by the numerous *amici*. After careful consideration, we find ourselves is disagreement with the position taken by the Third Circuit in *Buczynski*, and we affirm the judgment of the district court herein. We are convinced that this result comports both with the statutory language of ERISA, and with the legislative history of the Act.

STATEMENT OF THE CASE

Plaintiffs in the present case include the Utility Workers Union of America, and its Michigan State Utility Workers Council. These plaintiffs are the labor organizations that are bargaining agents for the operating, maintenance and construction employees of defendant, Consumers Power Company. Plaintiffs also include seven individual employees of Consumers Power, each of whom receives workers' compensation benefits under Michigan law, and each of whom is eligible to receive retirement benefits under the Pension Plan for Employees of Consumers Power Company.

The facts of the present case are both straightforward and undisputed. The Pension Plan for the Employees of Consumers Power provides for the calculation and payment of normal or early retirement benefits, in section V-1 of the Plan, as follows:

Appendix A

V-1. Normal or Deferred Retirement Income

The monthly Retirement Income payable to an employee who, at Normal Retirement Date or at Deferred Retirement Date, retires on or after January 1, 1976, pursuant to the provisions of the Plan from the service of the Company, will be an amount equal to the product of the employee's Final Pay times the sum of the percentages determined as follows:

1½% for each of the first 20 years of Accredited Service.

1% for each of the next 10 years of Accredited Service.

½% for each of the next 10 years of Accredited Service. . . .

The Plan further provides, in section V-2, for the reduction of a pensioner's retirement benefits by the amount of weekly workers' compensation payments that the pensioner receives from Consumers Power or its subsidiaries under the Michigan Workers' Compensation Act, MCLA 418.101 *et seq.* (The Plan does not provide an offset for payments that are made in liquidation of claims or for payments for medical expenses that are made by Consumers Power under the workers' compensation law.) Section V-2 of the Plan reads as follows:

V-2. Workmen's Compensation. All workmen's Compensation weekly payments received by a retired employee from the Company, Michigan Gas Storage Company, Northern Michigan Exploration Company, or anyone else making such payments for one of those companies will be a credit against any Retirement Income or any other payments under this Plan. Monthly payments under the Plan will be reduced by the amount of such credit pursuant to the following rules:

(a) The Credit will be based on Workmen's Compensation paid during the preceding month. If Workmen's Compensation payments are made for the entire month, the credit will equal 4-1/3 weekly Workmen's Compensation payments.

> (b) The maximum credit against any Retirement Income or any other payments under this Plan for Workmen's Compensation payments in any month will be the amount of such monthly payments due under this Plan for the succeeding month.

The above provision for a workers' compensation offset, which was incorporated into the Pension Plan in 1966, is the subject of the present litigation.

PLAINTIFFS' ALLEGATIONS

In their complaint, plaintiffs attacked the workers' compensation offset of the Consumers Power Pension Plan on three statutory grounds:

(1) Plaintiffs alleged that the offset worked a partial or total forfeiture of benefits to which the individual plaintiffs had non-forfeitable rights, in violation of § 203(a) of ERISA, 29 U.S.C. § 1053(a).

(2) Plaintiffs alleged that the offset allowed Consumers Power to satisfy its workers' compensation liabilities out of Pension Plan assets, in violation of § 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1). That section provides, in part, that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

(3) Plaintiffs alleged that the workers' compensation offset amounted to an assignment of an employee's accrued retirement benefits for the purpose of satisfying Consumers Power's liability under the Michigan Workers' Compensation Act, *supra*. Plaintiffs argued that such assignment violated § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), which reads, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

Upon cross-motions for summary judgment, the district court entered judgment in favor of plaintiffs, holding that the workers' compensation offset violated the vesting and forfeiture requirements of section 203(a) of ERISA. We agree with this conclusion of the district court, and thus we do not reach the merits of plaintiffs' other two allegations.

STATUTORY PROVISIONS/TREASURY REGULATIONS

Our application of the provisions of ERISA to the workers' compensation offset now in question begins with an analysis of the minimum vesting standards that are set out in section 203 of ERISA, 29 U.S.C. § 1053. Specifically, subsection (a)(2)(A) of section 203, 29 U.S.C. § 1053(a)(2)(A), establishes the following non-forfeitability requirement:[1]

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition . . . an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

In interpreting the scope of this non-forfeitability requirement, several definitions that are set out in § 3 of the Act, 29 U.S.C. § 1002, are relevant. For example, 29 U.S.C. § 1002(19) provides that,

> the term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a

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[1] ERISA contains certain exceptions to this non-forfeitability requirement which concededly do not apply to any of the plaintiffs in this action. *See* 29 U.S.C. § 1053(a)(3). Congress exempted from the non-forfeitability requirement of section 203(a)(2) pension plans which provide that payment shall cease if the survivor dies, plans which suspend payments while the participant is reemployed in certain types of industries, plans in which certain amendments are made retroactive, plans in which members have voluntarily withdrawn their mandatory contributions, and plans that are designed to forestall economic failure.

> participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

Further, 29 U.S.C. § 1002(22) defines a "normal retirement benefit" for purposes of ERISA as "the benefit under the plan commencing at normal retirement age," and 29 U.S.C. § 1002 (23)(A) provides that the "accrued benefit" to which a pensioner receives a non-forfeitable right is "the individual's accrued benefit [as] determined under the [pension] plan. . . ."

As a part of their argument to this Court, defendants focus on the phrase "under the plan" that Congress incorporated into each of the three definitions cited above. In essence, defendants argue that a pensioner receives a non-forfeitable right only to those accrued retirement benefits that are provided by the terms of the pension plan. In other words, according to defendants, if a pension plan provides for a reduction in benefits as a part of the plan's benefit computation process, the reduced benefits are the only accrued benefits to which a pensioner gains a non-forfeitable right. We reject defendants' argument for the reason that it proves too much. As the district court correctly stated, "to hold that any forfeiture or suspension of benefits is permissible so long as it is sanctioned by the [pension] plan is to turn [ERISA's] entire statutory scheme upon its head." *Utility Workers Union* v. *Consumers Power, supra,* 453 F. Supp. at 452. (We note that the district court also stated that its prior decision in *Carlson, supra,* had "resulted from excessive attention to the phrase 'under the plan' found in the definitional section of ERISA. . . ." *Id.* at 452, n. 8.) If this Court were to accept the reasoning of defendants, a company could legitimize any forfeiture of vested pension benefits simply by including the forfeiture into its pension plan's computation procedures. Such result, however, would be contrary both to the provisions and to the spirit of ERISA. For example, it has been held that

ERISA proscribes the forfeiture of an employee's vested pension benefits when the employee, upon separation from service, engages in employment that is competitive with his former contributing employer. *See, e.g., Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005, 1008 (N.D. Ohio 1976). In light of the illegal nature of such forfeiture for competitive employment, an employer cannot legitimize the forfeiture merely by providing in a pension plan that the benefit reduction is a computational adjustment of the plan's benefit level.

On the other hand, this Court acknowledges that not every reduction in pension benefits is prohibited by the non-forfeitability requirement of section 203. To the contrary, Congress has specifically sanctioned the practice of offsetting pension benefits by the amount that a pensioner receives in social security benefits. In establishing standards for qualified pension trusts in the Internal Revenue Code, 26 U.S.C. § 401(a)(15)(A), Congress provided that,

> A trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part, in the case of a participant or beneficiary who is receiving benefits under such plan . . . such benefits are not decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act . . . .

By prohibiting a pension benefit offset for any *increase* in social security payments, Congress implicitly approved the longstanding practice of offsetting pension benefits by the amount of social security payments that a participant receives at the time of his retirement. (We note that 26 U.S.C. § 401(a)(15)(A) has a counterpart in ERISA itself, 29 U.S.C. § 1056(b)(1).) Thus, certain offsets (*i.e.*, offsets that are comparable to an offset for social security payments) are reductions in benefits that do not violate the vesting requirements of section 203.

In view of the above statutory provisions, the crux of the present appeal may be framed in the following terms: Is the workers' compensation offset that is provided in the Consumers Power Pension Plan in the nature of an offset for social security payments – an offset that Congress implicitly sanctioned in the provisions of ERISA – or is the workers' compensation offset a forfeiture that is prohibited by the broad non-forfeitability language of section 203(a)? In addressing this question, we note that Congress included in ERISA only limited exceptions to the general non-forfeitability requirement of section 203. (These exceptions are found in 29 U.S.C. § 1053 (a)(3), and none are applicable in the present case.[2]) Further, we note that the requirement of non-forfeitability is one of the essential elements of ERISA's pension reform plan. When Congress enacted ERISA, it was concerned about employees who, after years of service to their employers, were denied pension benefits on account of their pension plan's restrictive vesting requirements. In the Act, Congress intended to provide these employees with guarantees that, after they had completed certain required years of service, they would gain unconditional and non-forfeitable rights to fixed pension benefits. Accordingly, Congress incorporated into section 203 of ERISA a broad proscription against forfeitures, and it drew only a few limited exceptions to the statutory provision. The House Committee, for example, in its comments on section 203, stated unequivocally that "with the limited exceptions noted [in 29 U.S.C. § 1053(a)(3)], no rights once they are required to be vested may be lost by the employee under any circumstance. . . ." H. Rept. 93-807, 1974 U.S. Code Cong. & Admin. News, pp. 4725-6. In light of the broad non-forfeitability language of section 203, and in light of the legislative history that underlies that section, this Court will carefully scrutinize any offset or reduction in pension benefits in order to determine if the offset or reduction is a forfeiture that is prohibited by ERISA.

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[2] *See* fn. 1, *supra*.

There is a final aspect of ERISA's statutory scheme that this Court is required to address in resolving the present appeal — namely, the regulations and rulings that have been issued by the Treasury Department on the subject of workers' compensation offsets over the past twenty-five years. In 1956, the Treasury Department issued Regulation § 1.401-4(b). That regulation pertains to section 401(a) of the IRC, 26 U.S.C. § 401(a), and to the standards set out therein that must be met by pension plans in order to qualify for favorable tax treatment. In this regulation, the Treasury Department stated that "the total benefits resulting under [a qualified pension] plan and under such [federal or state] law [must] establish an integrated and correlated retirement system satisfying the tests of section 401(a)." In other words, in the regulation, the Treasury Department recognized that pension benefits paid to a retiree may be offset by benefits provided under federal or state law, as long as the total benefits under the plan constitute "an integrated and correlated retirement system." In 1968, 1969 and 1978, the Treasury Department interpreted Regulation § 1.401-4(b), as it pertains to section 401(a), in the specific context of workers' compensation offsets. In the revenue rulings issued in these years, the Treasury Department reasoned that an offset for workers' compensation benefits was acceptable for purposes of section 401(a) because the total benefit package provided after such offset constituted "an integrated and correlated retirement system," as required by Regulation § 1.401-4(b). See Rev. Rul. 68-243, 1968-1 C.B. 157; Rev. Rul. 69-421, 1969-2 C.B. 59; Rev. Rul. 78-178, 1978-20 I.R.B. 9. As an example of its reasoning, the Treasury Department stated in Rev. Rul. 69-421, 1969-2 C.B. 59, at page 72, the following:

> . . . Benefits provided under a pension, annuity, profit-sharing, or stock bonus plan may be integrated with those provided under a state or Federal program that, like the social security program, requires employer contributions and makes benefits available to the general public. Thus,

> benefits payable under a state workmen's compensation law or an occupational diseases law may be an acceptable offset against benefits payable under a qualified plan. However, benefits payable under a qualified plan may not be offset by disability damages recovered by an employee in a common law action against the employer. See Rev. Rul. 68-243, C.B. 1968-1, 157.

In 1977, the Treasury Department adopted Regulation § 1.411 (a)-4(a) – a regulation that interprets the vesting and nonforfeitability provisions of section 411 of the IRC, 26 U.S.C. § 411. That regulation reads, in part, as follows:

> For purposes of Section 411 of the Code and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable [or vested] at a particular time if, at that time and thereafter, it is an unconditional right.

The regulation continues:

> Furthermore, *nonforfeitable rights are not considered to be forfeitable* by reason of the fact that *they may be reduced to take into account benefits which are provided* under the Social Security Act or *under any other Federal or State law* and which are taken into account in determining plan benefits. [Emphasis supplied.]

Defendants herein rely heavily on the above regulations and rulings of the Treasury Department. This Court finds itself in agreement with the terms of the two regulations cited above. In essence, in Regulation § 1.401-4(b) and Regulation § 1.411(a)-4(a), the Treasury Department recognizes the validity of offsets for benefits provided under federal or state law, as long as the benefits that are offset are a part of "an integrated and correlated retirement system." We agree with this principle; however, we disagree with the Department's application of the principle in its various revenue rulings. The Department specifically addressed the issue of workers'

compensation offsets only in the revenue rulings cited above. Therein, the Department concluded that workers' compensation benefits are benefits that are a part of "an integrated and correlated retirement system." It is with this specific conclusion of the Treasury Department, found only in its revenue rulings, that this Court takes exception.

PRELIMINARY QUESTIONS

Before we examine in detail the nature of workers' compensation benefits, we must address preliminary questions that have been raised by the parties on appeal. First, plaintiffs and defendants dispute at considerable length the question of whether or not the workers' compensation offset of the Consumers Power Pension Plan was the subject of free collective bargaining. This question, no matter how it is resolved, is irrelevant. Even assuming that a challenged offset has been the subject of collective bargaining, ERISA voids all private contractual arrangements in violation of its provisions. Under the terms of ERISA, employees may seek redress for an illegal forfeiture of benefits, despite the fact that their union has consented to the forfeiture in the collective bargaining process.

Second, plaintiffs and defendants dispute what weight this Court should accord the various Treasury regulations and rulings cited above. In the recent case of *General Motors* v. *Buha*, — F.2d — (6th Cir. 1980), this Circuit held that Treasury Regulation § 1.401(a)-13 was a legislative rather than an interpretative regulation, and that as such the regulation was entitled to considerable deference by the judiciary. (Regulation § 1.401(a)-13 was issued pursuant to the authority of 29 U.S.C. § 1202(c), the section that is the authoritative basis for Treasury Regulation § 1.401-4(6) and § 1.411 (a)-4(a), *supra.*) *See also Baker* v. *Otis Elevator*, 609 F.2d 686 (3rd Cir. 1979). We note first that in the present case this Court is in disagreement only with the revenue rulings of

the Treasury Department (Rev. Rul. 68-243, 1968-1 C.B. 157; Rev. Rul. 69-421, 1969-2 C.B. 59; Rev. Rul. 78-178, 1978-20 I.R.B. 9), and not with the two Treasury regulations cited above. We further note that all Treasury interpretations, legislative or otherwise, must be set aside if in the interpretation "the Secretary has exceeded his statutory authority, or if the interpretation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Batterson* v. *Francis*, 432 U.S. 416, 426 (1977). In our opinion, the above-cited revenue rulings of the Treasury Department are at odds both with the statutory language of ERISA and with its legislative history.

Finally, defendants argue that Congress was aware of those Treasury Department rulings that concluded that workers' compensation offsets were allowable under the provisions of ERISA. *See, e.g., Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, U.S. Senate, 92nd Cong., 2nd Sess., on Retirement Income Security for Employees Act, 1972, June 28 and 29, 1972, Part 3, pp. 997-980. In light of this, defendants conclude that Congress' failure to change the relevant statutory language of ERISA was an implicit approval of the Treasury Department interpretations. We point out that the pre-ERISA interpretations of the Treasury Department to which defendants refer pertained only to section 401(a) of the IRC – the "discrimination" section of the Code and not to those sections of the Code that relate to vesting and forfeitability under ERISA. Based in part on this fact, we conclude that these Treasury Department interpretations were not of such a longstanding nature or of such obviousness that Congressional failure to change ERISA's statutory language was tantamount to acquiescence in the administrative practice. *See Helvering* v. *Winmill*, 305 U.S. 79 (1938).

NATURE OF WORKERS' COMPENSATION BENEFITS

We now return to the central question presented on appeal: Are workers' compensation benefits and social security benefits "like" benefits for purposes of ERISA? (As indicated above, Congress has implicitly approved offsets for social security benefits in 26 U.S.C. § 401(a)(15)(A), *supra*. Thus, we assume that if workers' compensation benefits and social security benefits are "like" benefits, an offset for compensation benefits will also comport with ERISA's provisions.) This question may be rephrased to use the language of the Treasury Department: Are pension benefits, social security benefits, and workers' compensation benefits all a part of "an integrated and correlated retirement system," so that any one of the benefits may be used to offset the other under the provisions of ERISA? *See* Regulation § 1.401-4(b), *supra*.

The parties on appeal and the numerous *amici* have proposed several systems by which we can compare pension benefits, social security benefits and workers' compensation benefits. One such system is based on the so-called "common fund" doctrine. According to this doctrine, pension benefits, social security benefits and workers' compensation benefits are all like benefits because they spring from the same fund (*i.e.*, they are all paid, at least in part, by the employer). This is obviously a self-serving argument for the employer, and we find it to be of little use in the present context. The fact that an employer incurs multiple liabilities, or pays multiple benefits to an employee does not, in and of itself, make all such liabilities or benefits comparable. This "common fund" doctrine may find some support in revenue rulings such as Rev. Rul. 68-243, 1968-1 C.B. 157. Therein, the Treasury Department stated:

> The effect of section 401(a)(5) of the Code is to permit total [retirement] benefits, inclusive of those provided under the social security or similar program, to be used for comparative purposes. . . . A program, like the social

> security program, that requires employer contributions and makes benefits available to the general public is a similar program . . . .
>
> Since the benefits payable under a workmen's compensation law or occupational diseases law are available to the general public, it is held that benefits payable under such laws are acceptable as an offset against benefits payable under the qualified pension plan in the instant case. However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer.

However, we first of all question the correctness of the Treasury Department's conclusion that benefits payable under the workers' compensation law are benefits that are available to the "general public." Benefits payable under a typical workers' compensation statute are available only to a subclass of employees who have sustained a work disability (other than a normal age disability) within the course of their employment. In other words, workers' compensation benefits, unlike social security benefits and pension benefits, are available only to those employees who have fallen victim to certain unexpected disabilities. Moreover, we find that the factors set out in Rev. Rul. 68-243, *supra* – the funding of the program through employer contributions, and the availability of benefits to the general public – are merely superficial aspects of the various programs that we now consider. We find that these factors do not shed any light on the fundamental nature of pension benefits, social security benefits and workers' compensation benefits, so as to aid in a determination of whether these benefits all fit within "an interated and correlated retirement system," as required by Regulation § 1.401-4(b), *supra*.

There is a second and more substantive system that defendants recommend for use in comparing workers' compensation benefits with pension and social security benefits. This system is based on what we will call the "ultimate purpose" doc-

trine. Defendants argue that workers' compensation benefits, social security benefits, and pension benefits are all like benefits, because each is intended to provide "wage loss protection" when an employee is required to retire for a reason such as age, injury, or lack of work. In support of this argument, defendants cite state case law and academic treatises that indicate that workers' compensation is no longer a tort remedy, but is now a system of wage loss protection. *See, e.g., Fielder* v. *Travelers Insurance Co.*, 79 Mich. App. 449, 263 N.W. 2d 9 (1977); *Mazor* v. *State of Maryland*, 279 Md. 355, 369 A.2d 82 (1977); 4 *Larson, Workmen's Compensation Law*, § 97.51. Plaintiffs forcefully dispute this contention that workers' compensation is designed exclusively to provide wage loss protection, and they appear to view a concession on this point as fatal to their position. Further, the district court herein was careful not to hold that workers' compensation is simply in the nature of wage replacement. Judge Pratt reasoned as follows:

> In Michigan, workmen's compensation is a comprehensive replacement of the traditional tort remedies and their attendant common-law defenses. *Cruz* v. *Chevrolet Grey Iron Div., General Motors Corp.*, 398 Mich. 117 (1976) (Opinion of Coleman, J.); *Sims* v. *R. D. Brooks, Inc.*, 389 Mich. 91 (1973). See MCLA §§ 418.131, 418.141. That this system has compensatory elements beyond mere wage replacement is evident in MCLA § 418.357 which provides for up to 50% reductions in benefits paid to persons between their 65th and 75th birthdays. Despite the relatively few individuals who can be expected to earn income during these years, the legislature has provided continued benefits for them, presumably to compensate them, at least partially, for the added burden of their occupationally acquired disability.

We tend to agree with this reasoning of Judge Pratt. However, we do not agree that defendants will necessarily prevail in this appeal if we accept the position that workers' compen-

sation benefits are merely a part of a wage replacement system. The fact that various benefits serve the same ultimate purpose necessarily does not render all of them like benefits, in terms of ERISA. For example, when an employee leaves his employer and begins work at a competitor's business, the employee may gain rights to pension benefits under the pension plan of the competitor. These new pension benefits serve the purpose of wage loss protection; yet if they are offset against the pension benefits that the employee has earned at his former employer's, the offset is an illegal forfeiture under the terms of ERISA. *See Keller* v. *Graphic Systems of Akron, Inc., supra,* (forfeitures for competitive employment violate the non-forfeitability provisions of ERISA). Likewise, an employee may take out a private insurance policy to provide him with wage loss protection on the occurrence of a disabling injury. These insurance benefits also serve the purpose of wage loss protection; however, under ERISA, these benefits could not be used to reduce the employee's pension benefits under the pension plan of his employer.

We conclude that retirement benefits are like benefits for purposes of ERISA only when the "source of their entitlement" is the same. Pension benefits and social security benefits, regardless of the event that triggers their payment (*e.g.*, age or injury), are earned on account of the years of service that the employee-beneficiary has completed. In short, the years of service are the element that gives the employee the basic entitlement to the benefits. Congress focused on this fact in ERISA. When an employee devotes a substantial portion of his working life to his employer, ERISA guarantees the employee an unconditional right to pension benefits. In other words, ERISA reflects the fact that pension benefits are in the nature of deferred compensation that the employee has earned for the years of service that he has provided his employer. When Congress defined the term "non-forfeitable" in ERISA, it used the following language:

> [T]he term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan *which arises from the participant's service.* . . .

29 U.S.C. § 1002(19) (emphasis added). The same source of entitlement, then, is the factor that makes retirement benefits like benefits for purposes of ERISA. In other words, retirement benefits that have the same source of entitlement are all a part of "an integrated and correlated retirement system," and these benefits may be offset against each other in accordance with ERISA's provisions. *See* Regulation § 1.401-4(b), *supra.*

In conclusion, pension benefits and social security benefits are like benefits because they are both earned on account of the years of service that an employee has completed. Workers' compensation benefits, on the other hand, are not comparable in this regard. For purposes of workers' compensation law, it is irrelevant whether an employee has been at work for twenty years, ten years, five years, or one day. Workers' compensation benefits are paid solely because an employee has sustained an occupational injury within the course of his employment. Such injury is not only the event that triggers the payment of workers' compensation benefits; it is the sole source of the employee's entitlement to these benefits. Accordingly, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is not an offset that is in the nature of an offset for social security payments. That is, workers' compensation benefits are not a part of "an integrated and correlated retirement system" that properly includes pension benefits and social security benefits. To the contrary, the reduction of pension benefits by the amount that an employee receives in workers' compensation benefits is an illegal forfeiture that is prohibited by the non-forfeitability provision of section 203(a) of ERISA, 29 U.S.C. § 1053(a).

CONCLUSION

Judge Pratt characterized the present case as "a tortuous struggle of inference and counter-inference drawn from a highly specialized statute and its attendant legislative history." Yet, at the same time, Judge Pratt recognized that the case touches upon human situations. This recognition is entirely consistent with the provisions of ERISA and its legislative history. ERISA was designed to eliminate the human abuses that were imposed upon employees as a result of the unfair deprivation of their pension benefits.

In this context, we make the following observations and pose the following hypotheticals. Assume that two workers, who have earned comparable wages and who have completed comparable years of service, retire. The one worker is healthy and he retires because he has reached normal retirement age. The other worker retires because he has suffered a severe work-related injury that renders him totally disabled. The injured worker receives workers' compensation benefits; however, his total benefit package remains the same because his pension benefits are reduced by his workers' compensation benefits. The healthy worker, on the other hand, receives the identical benefit package, but remains free and able to supplement his pension benefits by post-retirement work. As another example, assume that a worker who is eligible for pension benefits is totally disabled in a work-related accident. If the worker receives workers' compensation benefits, he will experience a dollar-for-dollar reduction in his pension benefits. Why should this worker file an action under a workers' compensation statute? In their brief, defendants provide an answer to this question. They point out that it is preferable from a tax point of view to receive workers' compensation benefits as opposed to pension benefits. To be kind, we find defendants' answer to be unpersuasive.

The above hypotheticals are typical of real-life situations that would occur if defendants' position on appeal were accepted by this Court. Yet, these situations are the very ones

that ERISA sought to eliminate. They call to mind the specialized and technical legal terms that are applicable in this case – "chilling of the right to bring a workers' compensation suit," "a penalty," "a forfeiture." Judge Pratt depicted the human element in the case in the following cogent terms:

> Pensions, in contrast, represent deferred income, or other benefits foregone by the worker in hopes of a more secure retirement. See, e.g., *Mosley* v. *National Maritime Union Pension and Welfare Plan, supra.* A pension plan participant must labor for the employer for a period of time before acquiring vested benefits. Upon attainment of retirement age, he or she is entitled to the agreed-upon payments. A retiree receiving pension benefits who does not have a compensable disability is in a far different position than a retiree who has, for example, lost a limb. To hold as defendants contend, that each of these two hypothetical individuals is meant to receive the same post-retirement compensation is excessively short-sighted. A person who has lost his leg has suffered a greater disruption of his life than merely diminution of his earning capacity. If the Court were to accept the defendants' argument, both the healthy and the maimed retirees would receive the same post-retirement income even though the burdens on the two are clearly disparate.

We find Judge Pratt's reasoning to be accurate and persuasive. We affirm the district court's grant of summary judgment in favor of plaintiffs, for the reasons stated above.

Appendix A

ENGEL, Circuit Judge, dissenting. I respectfully dissent. I find more persuassive the opinion of Judge Garth in *Buczynski* v. *General Motors Corp.*, 616 F.2d 1238 (3rd Cir. 1980), *cert. granted*, 49 U.S.L.W. 3322 (Nov. 3, 1980). In *Buczynski* Judge Garth makes an extensive review of the legislative history of ERISA and concludes that Congress gave its implicit approval to the prior IRS practice of allowing offsets for workers' compensation benefits. Given the breadth of the Social Security program, Judge Garth also concludes that Congress approved offsets for disability benefits.

In my opinion, the result reached by the majority's construction of ERISA is inflexible, and is at odds with the statutory and regulatory scheme. The plain language of the pension plan for the employees of Consumers Power Company, which the union now seeks to repudiate, is not inconsistent with the provisions of ERISA, but on the contrary is consistent with the eligibility requirements under the Internal Revenue Code, 26 U.S.C. § 401(a)(15)(A) (1976), and with its counterpart in ERISA, 29 U.S.C. § 1056(b)(1) (1976). Both our circuit, in *General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980), and the Third Circuit in *Baker* v. *Otis Elevator*, 609 F.2d 686 (3rd Cir. 1979), have recognized that Treasury Regulation § 1.401(a)-13 is a legislative rather than an interpretative regulation and as such is entitled to considerable deference by the judiciary. That regulation provides in part:

> Furthermore, non-forfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other federal or state law and which are taken into account in determining planned benefits.

The majority, which states that it "finds itself in agreement" with the terms of the cited regulation, nonetheless holds that the regulation is not applicable to state laws providing for workmen's compensation benefits. In support thereof it asserts

that it is not bound by the revenue rulings of the Treasury Department, which more particularly recognize that workmen's compensation law and occupational disease law, being available to the general public, are acceptable as an offset against benefits payable under a qualified pension plan. *See Revenue Ruling* 67-243 (1968) – 1 C.B. 157.

While I readily recognize that a Treasury Department Revenue Ruling does not have the force of the regulation, it is in my opinion entirely consistent with the regulation itself and with the overall statutory scheme. It is true that workmen's compensation laws partake both of "wage loss protection" as well as an historic remedy in tort. While admittedly the issue is not without difficulty, in my opinion the majority opinion fails to refute the reasoning of Judge Garth and his recognition that workmen's compensation is in very real measure much like social security in the breadth of its coverage. *See Buczynski* v. *General Motors Corp., supra,* 616 F.2d at 1246-47.

In my opinion, the district court and the majority here appear overly concerned with the potential impact which the receipt of workmen's compensation benefits will have upon non-forfeitability where those benefits are to be received even after normal retirement age. While this is, in a sense, true, it is no more true in the case of workmen's compensation than it is with social security, and thus in my opinion it is not inconsistent with the intent of the statutory scheme. It would seem to me that the litigants ought to be as much concerned with the very direct threat to the stability of the pension plan itself by the impact of the majority's decision upon the integrity of the fund and its capability for providing real benefits to the workers at Consumers Power upon their retirement. The temporary benefits which a few may gain by the benefit of this "double dipping" must inevitably be offset by the economic realities that in the future the impact is bound to be felt in the financial weakening of an otherwise sound pension system. ERISA is a most useful addition to the body of

American law which is designed to protect the working man against forfeiture of pension rights. The interpretation given the Act by the Third Circuit is, in my opinion, to be preferred because it retains flexibility, avoids potential abuse, while fully protecting the objective of the Act in assuring income protection in a variety of circumstances.

APPENDIX B

Order of the United States Court of Appeals for the Sixth Circuit in *Utility Workers of America* v. *Consumer Power Company* of February 3, 1981

(Filed—February 3, 1891)

No. 78-1402

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, *et al.*,

Plaintiffs-Appellees,

v.

CONSUMERS POWER COMPANY, *et al.*,

Defendants-Appellants.

The opinion decided and filed in the above cause on January 6, 1981 is amended as follows:

On page 1, "Engle" is changed to "Engel".

On page 3, the citation to Buczynski v. General Motors Corporation is changed to read "*Buczynski* v. *General Motors Corporation,* 616 F.2d 1238 (3rd Cir.), cert. granted 49 USLW 3322 (Nov. 3, 1980)."

ENTERED PURSUANT TO RULE 4(f),
RULES OF THE SIXTH CIRCUIT
JOHN P. HEHMAN, Clerk

APPENDIX C

Opinion of the United States District Court for the District of Hawaii in *The Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company* v. *Eleanor Pascoe, et al.*, No. 78-0483 (District of Hawaii December 15, 1980)

THE BUREAU OF NATIONAL AFFAIRS, INC.

THE UNITED STATES LAW WEEK, WASHINGTON, D. C.

Date Filed: 12-15-80

Date Received: 12-23

THE EMPLOYEE BENEFITS COMMITTEE OF THE RETIREMENT SYSTEM OF HAWAIIAN TELEPHONE COMPANY, and HAWAIIAN TELEPHONE COMPANY,

Plaintiffs,

v.

ELEANOR PASCOE, EDWARD YOUNG, EDMUND LIN, FRANK YEE, CORNELIO KAAI, JAMES JEREMIAH, and LOCAL 1357, IBEW,

Defendants.

Civil No. 78-0483

United States District Court

Dist. of Hawaii

Dec. 15, 1980

Appendix C

Before:

HONORABLE SAMUEL P. KING

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MEMORANDUM AND ORDER

This action was brought under section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132 (1975), by the Employee Benefits Committee of the Retirement System of Hawaiian Telephone Company ("committee") and Hawaiian Telephone Company ("company"). Plaintiffs seek a declaratory judgment confirming their right to offset benefits received by defendants under the Hawaii Workers' Compensation

* Now Associate Justice, Supreme Court of Hawaii.

Law, Hawaii Rev. Stat. §§ 386-1 to 386-142 (1976), against benefits due defendants under the Retirement System of Hawaiian Telephone, the company pension plan ("plan").[1] Plaintiffs also seek return of a lump sum allegedly overpaid to defendant Pascoe and an alleged overpayment to defendant Jeremiah due to an increase in Jeremiah's workers' compensation benefit. Section 502, subsections (3)(1) and (f), confers jurisdiction on this Court to decide matters brought pursuant to the Act.

The case is before this Court on cross motions for summary judgment. No material issues of fact remain in dispute.

Each of the defendants is covered by the plan and is receiving or has received in a lump sum benefits under the plan. Each of the defendants has received or is receiving his own contributions to the plan. These are not at issue here. At issue is the right of plaintiffs to apply the plan's "offset" provision, found in art. VI, par. 7, of the 1976 revision of the plan and section 3, subsection 11, of the 1973 revision of the plan and which reads:

> Any amounts paid or payable by the Company or as the result of premiums or taxes paid therefore by the Company, under the provisions of the Hawaii Workers' Compensation Law or any similar law, to an employee or Retired employee or to his dependents on account of his service, any Disability or death shall be offset against and payable in lieu of any benefits payable out of funds provided from

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[1] The plan is administered by the company through the committee which consists of three to five members who are appointed by and serve at the pleasure of the Board of Directors of the company.

contributions of the Company under the provisions of this System on account of the same service, Disability or death. In case the present value of the total commuted benefits under the Hawaii Workers' Compensation Law or any similar law is less than the present value of any benefits otherwise payable from funds provided from contributions of the Company under the provisions of the System, then the present value of the commuted payments under the Hawaii Workers' Compensation Law or any similar law shall be deducted from the present value of these benefits and such benefits as may be provided by the remainder shall be payable under the provisions of these Rules.

1. FACTS

a. *Eleanor Pascoe*

Charles Pascoe, a long-time employee of the company, suffered a heart attack on June 8, 1974, that resulted in his death on June 18, 1974, at the age of 52. Pursuant to a provision of the plan, Charles Pascoe's widow, Eleanor Pascoe, received on July 11, 1974, a lump sum payment of $12,655.00 as a return of her husband's employee contributions to the plan, plus interest. She also received a second lump sum payment of $30,277.28 as an accidental death benefit derived from the company's contributions to the plan.

Mrs. Pascoe was subsequently awarded workers' compensation dependency benefits by the Director of Labor and Industrial Relations, State of Hawaii, on March 24, 1976. The company and the insurance carrier responsible

for payment of the award appealed the decision to the Labor and Industrial Relations Appeal Board.[2] The only issue litigated on appeal was whether the company should be permitted to offset the accidental death benefits paid under its pension plan against the awarded compensation. Citing the "strong policy expressed in Chapter 386 (of the Hawaii Revised Statutes) against the diminution or cancellation of compensation liability through any means," the Appeals Board denied the company's appeal.[3]

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[2] The Board is the state agency delegated the power to determine appeals from initial workers' compensation decisions. Hawaii Rev. Stat. § 386-87 (1967). Judicial review of decisions of the Board lies only in the Supreme Court of Hawaii, Hawaii Rev. Stat. § 386-88 (1976).

The appeal in the *Pascoe* case was prosecuted solely by the company.

[3] The Board cited the following sections of Chapter 386, Hawaii Revised Statutes, in support of the denial:

> § 386-9 Contracting out forbidden. Except as provided in § 386-78, no contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this chapter;
>
> § 386-57 Legal status of right to compensation payments. (a) the right to compensation under this chapter shall not be assignable, and the right to compensation and compensation payments received shall be exempt from the reach of creditors;
>
> (b) The right to compensation under this chapter shall have the same status as a lien or the same priority for the whole thereof with respect to the assets of the employer as are accorded by law to any unpaid wages for labor; and

(Footnote continued on following page)

Though Mrs. Pascoe was awarded $35,100.00, her lump sum recovery and weekly benefits totalled only $22,601.79 due to termination of weekly benefits upon her remarriage on August 26, 1977. Defendants seek recovery of the $22,601.79 as an offset against the plan benefits she collected. Mrs. Pascoe is now a resident of the State of Tennessee.

b. *Edward Young*

On August 17, 1977, at age 61 and with more than 31 years of service, Edward Young chose to retire from the employ of the company because he was over the normal retirement age of 60 and had sustained a permanent disability. Young elected to withdraw his accumulated employee contributions and received them, with interest, in a lump sum payment of $4,206.04. Young was eligible to receive a Service Retirement Allowance under the plan, and elected to receive the benefit in the form of a single-life

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(Footnote continued from preceding page)

§ 386-129 Employees not to pay for insurance; penalty. No agreement by an employee to pay any portion of the premium paid by his employer, or to contribute to a benefit fund or department maintained by the employer, or to the cost of mutual or other insurance maintained for or carried for the purpose of securing compensation as herein required, shall be valid; and any employer who makes a deduction for that purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be fined not more than $250.

Deps. of Charles Pascoe, Dec'd. v. *Hawaiian Telephone Co.*, Case No. AB-76-86, Decision and Order, Labor and Industrial Relations Appeals Board, State of Hawaii, March 15, 1977.

annuity payable at $120.93 per month. Subsequently, he was awarded temporary total disability benefits under workers' compensation in the amount of $167.00 per week. The company, through the committee, applied the offset provision and terminated payment of pension benefits when workers' compensation benefits commenced because the workers' compensation benefits exceeded what he was entitled to receive in pension benefits. Plaintiffs seek a declaratory judgment on the validity of the offset provision and their application of it to Young.

c. *Edmund Lin*

On September 1, 1977, at age 53 and after seven years of service, Edmund Lin was terminated from employment of the company because of a permanent disability. Lin was terminated by unilateral action of the company as provided for in the plan.[4] He elected to withdraw his employee contributions and received them, with interest, in a lump sum payment of $700.68. Lin elected also to receive an Accidental Disability Retirement Benefit ("disability benefit") in the form of a 100% joint and survivor annuity payable for his life and that of his surviving spouse at the rate of $239.56 per month. Subsequently, he was awarded temporary total disability benefits under the workers' compensation law in the amount of $90.93 per week. Because the temporary compensation benefits exceeded the pension entitlement, the company terminated the payment of pension benefits upon commencement of payment of workers'

[4] Despite its termination of Lin based on permanent disability, the company contended at the workers' compensation hearing that Lin was not totally disabled for work and in fact had suffered only a minimal permanent partial disability.

compensation benefits. Plaintiffs seek a declaratory judgment that this offset is valid.

d. *Frank Yee*

On September 10, 1977, at age 53 and with more than 25 years of service, Frank Yee was terminated by unilateral action of the company because of a permanent disability. Yee elected to withdraw his employee contributions and received them, with interest, in a lump sum payment of $11,769.76 . He was eligible to receive a disability benefit under the plan and received such benefit in the form of a single-life annuity payable at the rate of $799.95 per month. On September 13, 1977, Yee was awarded workers' compensation benefits of $112.50 per week payable by the employer up to a maximum liability of $35,100.00. An additional benefit of $112.50 per week payable out of the Special Compensation Fund[5] will commence if the maximum liability of the employer is reached and continue through the duration of his disability. The workers' compensation benefit of $112.50 per week is being offset against Yee's disability benefit so that he is receiving the balance of $290.45 per month from the plan. Plaintiffs seek a declaratory judgment that this offset is valid.

e. *Cornelio Kaai*

On December 1, 1977, at age 52 and with seven years of service, Cornelio Kaai was unilaterally terminated by the

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[5] The special compensation fund, established and maintained under the workers' compensation law, Hawaii Rev. Stat. § 386-151, is funded by contributions made by employers as required by other provisions of the law.

company because of a permanent disability[6] and elected to allow his employee contributions to remain in the plan, thereby increasing any pension benefit payable to him. Kaai was eligible to receive a disability benefit and elected to receive it in the form of a 50% joint and survivor annuity payable for his life at the rate of $463.01 per month, of which $452.42 would be attributable to employer contributions and $10.54 would be attributable to his own contributions, and for the life of his surviving spouse at the rate of $231.50 per month. On September 6, 1978, the Workers' Compensation Division awarded Kaai a benefit of $112.50 per week for the duration of his disability. Because that benefit exceeded the portion of the disability benefit attributable to employer contributions otherwise payable under the plan, the committee suspended payment of that portion until such time, if ever, as the payments from the plan exceed the workers' compensation award. Kaai is therefore only receiving the $10.59 per month attributable to his own contributions. The benefits Kaai is receiving are temporary total disability benefits. Plaintiffs seek a declaratory judgment that this offset is valid.

f. *James Jeremiah*

On December 1, 1977, at age 55 and with 34 years service, James Jeremiah was terminated by unilateral action of the company because of a permanent disability. Jeremiah elected to allow his employee contributions to remain in the plan, thereby increasing the pension payable to him. He was also eligible to receive a disability benefit and

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[6] The company contended at the workers' compensation hearing that Kaai was not permanently totally disabled for work.

elected to receive it in the form of a 50% joint and survivor annuity payable to him at the rate of $620.90 per month of which $511.16 would be attributable to employer contributions and $109.74 would be attributable to his contributions, and for the life of his surviving spouse at the rate of $310.45 per month.

Jeremiah initially was awarded workers' compensation benefits of $75.00 per week.[7] On March 8, 1978, the award was increased to $100.27 per week.[8] Neither the company nor the committee was aware of the increase. From Jeremiah's termination on December 1, 1977, through October 31, 1978, the $75.00 per week was set-off against Jeremiah's disability benefit and he received a balance of $295.50 per month from the plan. The plan is now offsetting the full workers' compensation benefit against the pension benefit and, along with declaratory relief, plaintiffs seek the return of an alleged total overpayment of $1,204.50 plus interest.[9]

Local 1357, International Brotherhood of Electrical Workers (IBEW) raised grievances on behalf of defendants Young, Lin, Yee, Kaai and Jeremiah alleging invalidity of the offset provision under ERISA. These griev-

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[7] The company contended at the workers' compensation hearing that Jeremiah was not permanently totally disabled for work.

[8] The company was ordered to pay weekly compensation of $100.27 for 90% of permanent total disability for 224.3941 weeks for a total of $22,500.00. Beginning July 7, 1979, the Special Compensation Fund paid $100.27 weekly for the duration of the disability.

[9] This sum is calculated by plaintiffs as an alleged overpayment of $109.50 per month for a total of eleven months.

ances still pending and awaiting the outcome of this declaratory action. No grievance was raised on behalf of Eleanor Pascoe since her husband was a supervisory employee not represented for collective bargaining purposes by the union. On August 1, 1977, plaintiffs filed *The Retirement System of Hawaiian Telephone* v. *Eleanor Pascoe,* Civil No. 52214, in the Circuit Court of the First Circuit, State of Hawaii, seeking the same relief sought here. After Pascoe filed motions to dismiss and/or for summary judgment, the parties stipulated to a dismissal without prejudice, apparently to allow the plaintiffs to file in federal court against the several defendants against whom offsets were being carried out.

2. Employee Retirement Income Security Act (ERISA)

Plaintiffs seek declaratory relief establishing that the offset provision is legal, binding upon defendants and other participants and beneficiaries under the plan, and that its enforcement is incumbent upon the committee as the fiduciary responsible for enforcing the plan. They claim that failure to carry out such offsets would injure the company by requiring it to increase its contributions beyond those contemplated by the company and the union during collective bargaining. For all defendants except Pascoe the company's claim is based on its assertion that the offset provision does not contravene section 203(a) of ERISA, 29 U.S.C. § 1053(a)(1975), which provides:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . .

Appendix C

Section 203(a)(1) further provides that in order to satisfy the section, each pension plan must provide that ". . . an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable." 29 U.S.C. § 1053 (a)(1)(1975). Section 203(a)(1) is not at issue here since all the defendants are receiving or have received their employee contributions.

A plan must satisfy paragraphs (1) *and* (2) under section 203(a). To satisfy paragraph (2), a plan must satisfy subparagraph (A), (B), or (C). The combination of provisions incorporated into a plan under section 203 (a)(1) and (2) constitute the minimum vesting standards for that plan. That is, in order to meet minimum vesting requirements, a plan must provide that an employee's right to his normal retirement benefit upon reaching normal retirement age is nonforfeitable (vested), and that an employee's right in his accrued benefit derived from his own contribution is nonforfeitable, and the plan also must provide one of the alternatives under subparagraphs (A), (B) or (C). The latter provision in a plan is commonly referred to as alternative vesting. The plan here incorporated subparagraph (A). That provision reads:

> (A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

Plaintiffs base their contention that the offset does not contravene section 203(a) on section 401(a)(5) of the Internal Revenue Code, 26 U.S.C. § 401(a)(5) (1978), a provision that plaintiffs claim allows such an offset. Plaintiffs also rely on treasury regulations promulgated under section 401(a)(5).

Appendix C

Defendants assert that the clear language of ERISA's minimum vesting and nonforfeiture provisions, prohibition against alienation of benefits, and express policy to protect the interests of participants and their beneficiaries by requiring vesting of accrued benefits show that the offset provision is void under ERISA. They argue that the label "offset" should not fog the true nature of this "forfeiture".

a. *ERISA Coverage*

Before taking up these arguments, it is necessary to examine the application of ERISA to the defendants. Plaintiffs concede that ERISA's nonforeiture provisions apply to all the defendants except Mrs. Pascoe. For plans in existence on January 1, 1974, ERISA provides for its application in cases of plan years beginning after December 31, 1975, 29 U.S.C. § 1061(b)(2) (1975). Since Charles Pascoe died and Eleanor Pascoe received her pension benefits in 1974, ERISA, but its terms, does not apply to her benefits, *Keller* v. *Graphic System of Akron, Inc.*, 422 F. Supp. 1005, 1008-1009 (N.D.Ohio 1976); *Martin* v. *Bankers Trust Co.*, 417 F. Supp. 923, 925-926 (W.D. Va. 1976); *Barcelona* v. *Fox Grocery Co. Emp. Pen. Plan*, 483 F. Supp. 1128, 1131 (W.D.Pa. 1980); *Fox* v. *Merrill Lynch & Co., Inc.*, 453 F. Supp. 561, 565-566 (S.D.N.Y. 1978); *Savoretti* v. *Hotel & Restaurant Emp. & Bartenders*, 470 F. Supp. 1286, 1290 (S.D.N.Y. 1979); *Schlansky* v. *United Merchants & Manufacturers, Inc.*, 443 F. Supp. 1054, 1063-1064 (S.D.N.Y. 1977). The gradual changes in rules governing pension plans under ERISA were carefully structured by Congress with a wide variety of effective dates, and the intent of Congress to give the law

only prospective application is clear, *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U.S. 702, 721-722, n. 40 (1977); *Nolan* v. *Meyer,* 520 F.2d 1276, 1278 (2d Cir. 1975). *See also Wilson* v. *Board of Trustees, Inc.,* 564 F.2d 1299, 1302 (9th Cir. 1977).

Defendants nevertheless claim that, though collection of benefits occurred in 1974, Mrs. Pascoe did not apply for and receive workers' compensation benefits until after January 1, 1976, the effective date of ERISA for this plan. They argue that the section 203 standards apply to the offset against Mrs. Pascoe's penson benefits and prohibit the forfeiture. Accepting this interpretation makes the answer turn on when Mrs. Pascoe received workers' compensation benefits rather than on the effective date of the plan and when her pension benefits were paid. Such a strained interpretation is directly contrary to the clear intent of Congress in establishing the effective dates for ERISA provisions. Defendants' claims based on forfeiture and minimum vesting under ERISA do not apply to the Pascoe situation.

b. *Nonforfeiture*

For circumstances similar to the instant one, other federal courts have taken various paths to decide whether similar offsets were or were not forfeitures under ERISA. A careful analysis of these cases leads this Court to conclude that a forfeiture has occurred here.

Under 29 U.S.C. § 1002(19):

> The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant of his beneficiary to that part of

> an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

The clear meaning of these words indicates that a forfeiture occurs whenever a company takes away the right to receive full benefits to which an employee is entitled under a plan.

The United States Supreme Court recently gave a broad interpretation to the nonforfeitability provision in ERISA in holding that vested benefits under a plan are nonforfeitable in spite of a plan provision that limited benefits to the amounts that could be provided from the assets of the fund. *Nachman Corp.* v. *Pension Ben. Guaranty Corp.*, 446 U.S. ——, 100 S.Ct. 1723 (1980). In referring to deprivation of benefits to employee due to termination of pension plans, the Court stated:

> Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it.

Id. 100 S. Ct. at 1733. The legislative history of ERISA also supports a broad interpretation of the nonforfeitability language. For example, the House Conference Report indicates that "[U]nder the conference substitute, except as

outlined below, an employee's rights, once vested, are not to be forfeitable for any reason."[10]

Plaintiffs' argument that the offset does not constitute a forfeiture is based on two provisions in the Internal Revenue Code (IRC): (1) section 411 of the IRC, 26 U.S.C. § 411 (1978), and Treas. Reg. § 1.411(a)-4(a) promulgated under it and (2) section 401(a)(5) of the IRC, 26 U.S.C. § 401(a)(5) (1978). Plaintiffs contend that both of these provisions authorize such an offset and both are valid exercises of the power to make rules under ERISA.

Treas. Reg. § 1.411(a)-4(a) was promulgated under section 411 of the IRC, 26 U.S.C. § 411 (1978), and provides:

> Nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.[11]

Plaintiffs are clearly correct in their assertion that this regulation permits the workers' compensation offset in the plan. Since the language of ERISA indicates otherwise, as discussed *supra*, the question of the validity of the

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[10] H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5052. The exceptions referred to in the report, see note 14, *infra*, are unrelated to workers' compensation benefits.

[11] This regulation interprets the minimum vesting standards section of the IRC but was made applicable to the minimum vesting standards provision of ERISA through § 3002(c) of ERISA, 29 U.S.C. § 1202(c) (1975).

regulation arises. Its validity has split other courts considering the forfeiture issue. Two cases decided in opposite ways in the same district illustrate the problem.

In *Utility Workers Union of America* v. *Consumers Power Co.*, 453 F. Supp. 477 (E.D.Mich. 1978), the court held that the offset of workers' compensation benefits constituted a prohibited forfeiture under ERISA. In doing so, the court gave little or no weight to Treas. Reg. § 1.411 (a)-4(a) since it was not convinced that the Secretary of the Treasury had been given authority to make final interpretations of ERISA or that the practice of allowing such offsets was either long-standing or of such obviousness that failure by Congress to override it in some way indicated an acquiescence by Congress. In *Bordine* v. *Evans Products Co.*, 453 F. Supp. 19 (E.D.Mich. 1978), the court concluded that such offsets were not prohibited forfeitures, relying in part on the regulation but without discussing its possible conflict with the statutory language.

In a more recent case, *Stong* v. *Bucyrus-Erie Co.*, 472 F. Supp. 1089 (E.D.Wis. 1979), the court held the regulation invalid as inconsistent with the language and intent of the statute. The court questioned whether congressional intent as to the ERISA forfeitability provision bears any relationship at all to the § 411 intent and concluded that the regulation impeded the congressional goal of nonforfeitability. The court stated:

> For they ask me to conclude that, in the course of enacting a comprehensive remedial statute for the protection of the rights of workers to their earned retirement benefits, benefits which are essentially deferred compensation for services rendered, Congress left a gaping hole in its handiwork, allow-

> ing these benefits to be reduced proportionately when a retired worker successfully asserts a workers' compensation claim. However, workers' compensation benefits are intended to compensate an employee for suffering a job-related injury and are not intended to supply retirement security.

Id. at 1093.

The court continued:

> I think it would be an unreasonable interpretation of ERISA and contrary to its spirit to conclude that Congress injected another trade-off into this intricate scheme, forcing an employee with a work-related injury to forego the relief provided by statute for such injury in order to preserve his retirement benefits. Clearly, the nonforfeitability rule, with its narrowly defined and carefully delimited exceptions, was aimed at precluding such a harsh dilemma.

Id. The court also noted that the Secretary of the Treasury, in a brief submitted to the court urging it to reject the *Utility Workers* result, stated that the *Utility Workers* court " 'gave too much weight to the statutory language. . . .' " In rejecting this reasoning, the court pointed out that the first duty of the court is to accord weight to the statutory language.[12]

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[12] On a motion for reconsideration of the court's ruling in *Stong*, Judge Gordon considered new arguments made by the Secretary of the Treasury in support of the treasury regulation. The court not only rejected these arguments but indicated that they served to reassure it of the correctness of its earlier position, *Stong* v. *Bucyrus-Erie Co.*, 481 F. Supp. 760 (E.D.Wis. 1979).

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In two other cases, United States district courts have invalidated Treas. Reg. § 1.411(a)-4(a) in holding that workers' compensation offsets constitute forfeitures under ERISA. *Buczynski* v. *General Motors Corp.*, 456 F. Supp. 867 (D.N.J. 1978) *aff'd on reconsideration* 464 F. Supp. 133 (D.N.J. 1978); *Alessi* v. *Raybestos-Manhatten, Inc.*, Civil Action No. 78-0434 (D.N.J. 1978). The reasoning of the *Buczynski* court was that the language in ERISA and its legislative history indicate that ". . . Congress expected that pension benefits would generally be nonforfeitable, and that employees would forfeit benefits only under narrowly defined circumstances." 464 F. Supp. at 136. Since the regulation did not assist in achieving that goal but rather impeded it, it was held to be inconsistent with the statute. The court started with the general proposition that forfeitures of pension benefits are prohibited under ERISA except as to narrowly defined exceptions. Since none of the exceptions even mention workers' compensation benefits, the court held that such an offset was prohibited. The legislative history of ERISA supports this interpretation. Congress declared that "an employee's rights, once vested, are [with certain exceptions] not to be forfeitable for any reason. . . ." H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5052.

The holdings in *Buczynski* and *Alessi* recently were reversed by the United States Court of Appeals for the Third Circuit in *Buczynski* v. *General Motors Corp.*, 616 F. 2d 1238 (3d Cir. 1980); *cert. granted* 49 U.S.L.W. 3332 (Nov. 4, 1980). In its analysis, the Third Circuit began with the regulation rather than the statute and, giving great deference to the regulation as a legislative rule, held it valid. Based on *Batterton* v. *Francis*, 432 U.S. 416

(1977) and its own earlier holding in *Baker* v. *Otis Elevator Co.*, 609 F.2d 686 (3d Cir. 1979), the court held that to sustain a legislative rule, "'we need only determine . . . that its promulgation is not an abuse of discretion, that it is neither arbitrary or [sic] capricious, not contrary to the governing statutory section and ERISA as a whole,' 609 F.2d at 692." 616 F. 2d at 1243. Despite the Third Circuit's interpretation and reversal of the district court holdings, it appears to this Court that the district courts did precisely what the circuit court said should be done. That is, they examined the language and legislative history of ERISA and found the regulation contrary to the governing statutory section and ERISA as a whole.

The Third Circuit placed great emphasis on the treatment of social security benefits under ERISA. It reasoned that when Congress enacted ERISA, the IRS had extensive previous experience in administration of pension plans as they relate to the tax laws. The IRS had promulgated regulations and issued rulings in its administration of the statutory requirement that pension plans be nondiscriminatory. Specifically, the IRS had a long-standing practice of allowing pension plan offsets for social security benefits but allowing offsets for any increase of social security benefits after a retiree began to receive his pension. Congress adopted and codified this administrative practice in ERISA at 26 U.S.C. § 401(a)(15)(1978). Accordingly, the court reasoned, Congress was giving tacit approval to other types of offsets. That is, by disapproving of offsets against social security benefit increases, Congress was approving of offsets against social security and other benefits in general. In light of the general prohibition against forfeitures under ERISA, it seems far more reasonable to assume that Congress, by disapproving of offsets against

social security increases, was approving of social security benefit offsets but not making a sweeping statement about offsets based on other kinds of benefits.

In reaching the same conclusion about forfeitures under ERISA, the court stated in *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, 409 (2d Cir. 1977) *aff'd on rehearing* 586 F.2d 968 (2d Cir. 1978): "When § 203(a)(3)(B) provides that certain kinds of suspensions are not forfeitures, it necessarily implies that those not falling within its terms are." 570 F.2d at 409. *See also Keller* v. *Graphic Systems of Akron, Inc.*, 422 F. Supp. 1005, 1008 (N.D.Ohio 1976). Relying on the requirement that a nonforfeitable right be "unconditional and legally enforceable against the plan. . . .", 29 U.S.C. § 1002(19)(1975), Judge Friendly held in *Riley* that a pension plan that prohibited post-retirement employment in a related area placed a condition on the employee's right to receive benefits and constituted a prohibited forfeiture.[13] *See also Stong* v. *Bucyrus-Erie Co.*, 481 F. Supp. 760, 762 (E.D.Wis. 1979). Likewise, plaintiffs' characterization of the offset here indicates that they view an employee's right to receive full pension benefits as conditioned on his not receiving workers' compensation benefits.

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[13] Judge Friendly stated:

> . . . The provision . . . places a condition on Riley's claim to the monthly benefits to which he would otherwise be entitled and makes his claim legally unenforceable against the Plan; it thus constitutes a forfeiture within the meaning of ERISA. This is nonetheless true because, despite the contrary thrust of the language of the plan, the trustees are willing to pay the benefits if Riley quits his government job. 570 F.2d at 409.

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Section 401 of the IRC provides requirements for a trust for pension plan benefits to be a "qualified" trust for tax purposes. Section 401(a)(4), 26 U.S.C. § 401(a)(4) (1978), provides that such a trust may not discriminate as to contributions or benefits in favor of employees who are officers, shareholders, or highly compensated. Section 401 (a)(5) provides that a plan shall not be considered discriminatory under section 401(a)(4) because benefits to employees may ". . . differ because of any *retirement benefits* created under State or Federal law." 26 U.S.C. § 401 (a)(5) (1978). (emphasis added). Plaintiffs argue correctly that this provision indicates that at least some forfeitures are permitted under ERISA. That some forfeitures are permitted is clear under section 203 of ERISA itself, the provision under which some forfeitures are prohibited,[14] and under section 206 of ERISA, 29 U.S.C. § 1056 (b) (1975), the counterpart to section 401 of the IRC.[15]

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[14] Section 203(a)(3) of ERISA, 29 U.S.C. § 1053(a)(3) (1975), provides certain types of situations under which benefits can be forfeited without violating ERISA. These are benefits not payable because a participant dies (except in the case of a survivor annuity), benefits not payable because an employee is reemployed by the same company subsequent to the commencement of payment of benefits, benefits not payable because plan amendments may be given retroactive application as provided under another section of ERISA; and benefits not payable because a participant who is less than 50% vested chooses to withdraw any amount attributable to his own mandatory contributions.

[15] Section 206 provides:

> If—
>
> (1) a participant or beneficiary is receiving benefits under a pension plan, or

(Footnote continued from preceding page)

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None of the exceptions in sections 203 and 206 of ERISA is even related to workers' compensation benefits.

Even assuming that the section 401(a)(5) nondiscriminatory provision applies to this forfeiture, it is clear that the provision uses the term "retirement benefits". At issue here are workers' compensation benefits, not retirement benefits in the usual sense. Plaintiffs, again relying on Internal Revenue Service (IRS) interpretations, take the position that workers' compensation benefits are a public retirement program. Plaintiffs base their interpretation on two Revenue Rulings to the effect that disability benefits derived from any state or federal law qualify as public retirement programs for purposes of section 401(a)(5). In one case, Rev. Rul. 62-152, 1962-2 C.B. 126, an offset for disability benfits payable under the Social Security Act was authorized as an acceptable provision in a qualified pension plan which also provided disability benefits.

In the second, Rev. Rul. 68-243, 1968-1 C.B. 157, an offset for benefits payable under workers' compensation was

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(Footnote continued from preceding page)

(2) a participant is separated from the service and has nonforfeitable rights to benefits, a plan may not decrease benefits of such a participant by reason of any increase in the benefit levels payable under title II of the Social Security Act or the Railroad Retirement Act of 1937, or any increase in the wage base under title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first entitlement of such benefits or the date of such separation.

29 U.S.C. § 1056(b) (1975).

approved.[16] This ruling was based on the reasoning that such benefits require employer contributions and are available to the general public. However, the ruling goes on past what plaintiffs cite in support of their position. The sentence following reads: "However, benefits under the plan may not be offset by disability damages recovered by an employee in a common law action against the employer." 1968-1 C.B. at 157, 158. This must surely be a very confusing ruling. Section 386-5, Hawaii Rev. Stat., provides:

> § 386-5 Exclusiveness of right of compensation. The rights and remedies herein granted to an employee or his dependents on account of a work injury suffered by him shall exclude all other liability of the employer to the employee, his legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury.

The statutory provision in Hawaii, as in every other state, preempts any common law remedy an employee previously may have had against an employer. *See Evanson* v. *Univ. of Hawaii,* 52 Haw. 595, 483 P.2d 187 (1971); *Stong* v. *Bucyrus-Erie Co.,* 472 F. Supp. 1089, 1093 (E.D. Wis. 1979).

To include workers' compensation benefits within the "integration" of benefits provided for under section 405 (a)(5), one would have to ignore the nature of workers' compensation. Integration is defined as the "process of

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[16] This ruling was reaffirmed in Rev. Rul. 78-178, 1978-1 C.B. 117.

meshing a government retirement system with a qualified private plan." M. Canan, Qualified Retirement Plans at 256 (1977). Section 401 attempts to allow integration of retirement benefits such as social security and railroad retirement benefits. While in some cases, workers' compensation benefits are awarded concurrently with or subsequent to retirement, the benefits clearly are intended to indemnify workers for job-related injury or disease—not to provide income lost upon retirement.[17] Significantly, the nature of workers' compensation benefits was considered and discussed by the court in *Utility Workers, supra,* and not in *Bordine, supra.*

Under the Hawaii law, both total and partial disability benefits can be awarded on a temporary basis, Hawaii Rev. Stat. §§ 386-31(b), 386-32(b) (1976). In Rev. Rul. 68-243,

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[17] That the benefits are intended to be compensatory is clear from specific sections of the Hawaii law. For example, an employer is liable for personal injury caused either by accident in the course of employment or by disease proximately caused by or resulting from the nature of the employment, Hawaii Rev. Stat. § 386-3. The law also provides that an employer shall furnish medical care, services and supplies, Hawaii Rev. Stat. § 386-21, any artificial limbs or other aids, Hawaii Rev. Stat. § 386-22, medical rehabilitation, Hawaii Rev. Stat. § 386-24, and vocational rehabilitation, Hawaii Rev. Stat. § 386-25. Also indicative of the compensatory nature of the benefits are sections that provide that certain types of injuries shall be deemed permanent and total for purposes of awarding benefits. These include total loss of sight in both eyes, loss of both feet or hands, loss of one hand and one foot and paralysis, Hawaii Rev. Stat. § 386-31. The same is true for the provision concerning partial disability. The loss of a thumb, certain fingers or toes, one hand, one arm, one foot, one ear, among others, constitute partial disability. Hawaii Rev. Stat. § 386-32. For each type of injury, the statute provides for certain periods of coverage for partial disability.

supra, the IRS ruled that benefits that require employer contributions and are made available to the general public may be offset. However, in Rev. Rul. 78-178, 1978-1 C.B. 117, the IRS came upon against its own rule when the question was raised as to offset of unemployment compensation benefits. The IRS ruled that such benefits could not be offset because they are temporary and are not benefits which can be provided under a qualified pension plan even though they are benefits that require employer contributions and are made available to the general public. In that ruling, the IRS conceded that there are many benefits under public programs that cannot be integrated with pension benefits, citing benefits payable under state or federal programs because of sickness as an example. *See* Treas. Reg. § 1.401-1(b)(1)(i). The IRS considered the temporary nature of unemployment benefits to be an important factor in its ruling. These characteristics of unemployment insurance as related to workers' compensation also cast doubt on the usefulness of the IRS interpretation of what constitutes a forfeiture under ERISA. Workers' compensation is basically a program designed to compensate for work-related illness or injury and is often awarded on a temporary basis. The benefits awarded to defendants Lin, Young and Kaai are temporary total disability payments and can be terminated if the Director of Labor and Industrial Relations finds their temporary disabilities have ceased.

The statutory language in ERISA and its legislative history, the compensatory nature of workers' compensation benefits and the clear policy to prohibit forfeitures except in certain specified instances convinces this Court that offsets for workers' compensation benefits as provided for in this pension plan constitute forfeitures under ERISA.

Appendix C

c. *Individual defendants*

This leaves the final question of whether each of the defendants had reached a stage according to his age or length of employment with the company so that such "forfeiture" or "offset" against his benefits is prohibited.

As to minimum vesting and nonforfeiture, the defendants fall into three categories: (1) voluntary retirement at over the normal retirement age and receiving a Service Retirement Benefit (Edward Young) (2) terminated by the company at below normal retirement age, vested due to a period of over 10 years of service and receiving disability benefits, (Frank Yee and James Jeremiah), and (3) terminated by the company at below normal retirement age with less than 10 years of service and receiving disability benefits (Edmund Lin and Cornelio Kaai).

The disability benefits are exclusive of all other benefits under the plan. That is, these benefits are and will continue to be the *only* retirement benefits received by these defendants. They will not be entitled to receive an additional Service Retirement Allowance upon attaining age 60.[18] This fact is important in characterizing the benefit under ERISA's nonforfeiture and minimum vesting provisions.

(1) Edward Young

The application of the setoff to Young raises two further issues under ERISA: (1) whether he is receiving

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[18] Although this feature of the plan is not clear from the plan itself, plaintiffs filed an affidavit that indicated this is a correct interpretation of the plan.

a "normal retirement benefit" and (2) whether he had attained "normal retirement age" when he retired. Under ERISA, normal retirement benefit "means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." 29 U.S.C. § 1002(22) (1975). Young retired at over the age of 60 and took a Service Retirement Allowance under art. V.1.(a) or (b) of the plan. This is a benefit under the plan commencing at normal retirement age. Under ERISA, 29 U.S.C. § 1002(24) (1975), the term normal retirement age means the earlier of—

> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the the plan.

Under the plan, "normal retirement *date*" (emphasis added) is defined as the "first day of the month coinciding with or following the Employee's sixty-fifth (65th) birthday." The plan also defines "early retirement date" as "any date prior to the Normal Retirement Date on which the member Retires or is Retired. . . ." It is clear from the plan and from plaintiffs' use of the term in their memoranda that "normal retirement age" is 60, not 65. The plan defines "early retirement" to be a retirement prior to age 60 and an employee may retire and receive a Service Retirement Allowance upon attaining age 60. Upon retirement, Young began receiving a normal retirement

benefit and had attained normal retirement age. Therefore, the offset against his pension benefits is a forfeiture prohibited under ERISA.

(2) Frank Yee and James Jeremiah

Frank Yee retired at age 53[19] with more than 25 years of service and James Jeremiah at age 55[20] with 34 years of service. Both were retired by unilateral action of the company and are now receiving disability benefits. The plan includes alternative (A) under 29 U.S.C. § 1053(a)(2)(1975) which provides: "A plan satisfies the requirement of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions." Under 29 U.S.C. § 1002(23)(A) (1975), "accrued benefit" means "the individual's accrued benefit determined under the plan and, . . . expressed in the form of an annual benefit commencing at normal retirement age, . . ." Under the plan, accrued benefit is equivalent to the employee's accumulated contributions plus pension, with pension defined in the plan as "payments under the System for life derived from contributions made by the company."

Both Yee and Jeremiah are receiving disability benefits to which they are entitled because they were retired by the company based on the company's determination that they were permanently incapacitated for the further performance of duty. Under the plan, this type of benefit is exclusive of all others. That is, an employee already

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[19] Frank Yee's birth date is November 19, 1923.

[20] James Jeremiah's birth date is August 14, 1922.

receiving a disability benefit is not entitled to elect to receive an additional Service Retirement Allowance upon attaining age 60 nor a Vested Retirement Allowance at a later date. The disability benefit is calculated as 66⅔ percent of the employee's average final salary and commences immediately upon retirement. The Service Retirement Allowance available at age 60 and after 15 years of creditable service is calculated by multiplying 1.65 percent of the average final salary by the years of creditable service. The company indicates that, in almost all cases, an employee will receive larger periodic payments under a disability benefit than under a Service Retirement Allowance. Both Yee and Jeremiah would have been eligible for a Service Retirement Allowance at age 60 had they not been retired by the company.

Under section 203 of ERISA, an employee is protected against forfeiture of a normal retirement benefit at normal retirement age. "Normal retirement benefit" is defined as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." 29 U.S.C. § 1002(22) (1975). The normal retirement benefit "shall be determined without regard to—

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit."

Id. A qualified disability benefit is "a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age." *Id.* The description of the term "accrued benefit" in the legislative history

indicates that the term was used synonymously with normal retirement benefit.[21] The point seems to be that an employee has a nonforfeitable right to pension benefits after 10 years of creditable service and upon attaining normal retirement age.

Since the definition of normal retirement benefit excludes disability benefits which do not exceed benefits received if an employee were separated at normal retirement age, this Court concludes that normal retirement benefits do include disability benefits which exceed those which could have been received if the employee were separated at normal retirement age. This interpretation treats the accidental disability benefits received by Yee and Jeremiah as "normal retirement benefits." Therefore, once they reach normal retirement age, 60 under this plan, any offset of workers' compensation benefits constitutes a prohibited forfeiture in violation of section 203 of ERISA, 29 U.S.C. § 1053 (1975). Any offset prior to age 60, though a forfeiture under ERISA, is not prohibited.

Plaintiffs, in order to bring the plan in compliance with the minimum vesting and nonforfeiture provisions of ERISA as to Yee and Jeremiah, must treat their disability benefits as "normal retirement benefits" when each

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[21] Under the conference substitute, the term "accrued benefit" refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for such expenses), or disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee with comparable service under the plan, or to life insurance benefits payable as a lump sum. H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5054.

reaches age 60 or convert each employee's disability benefits into a Service Retirement Allowance at age 60 if the employee chooses that age or a Vested Retirement Allowance at age 65 if the employee chooses the later age. This option of the company must be carried out without any penalty to the employee based on his prior receipt of disability benefits. Any benefit chosen by the employee at or after age 60 is protected against forfeiture under ERISA. The fact that the company unilaterally terminated these employees before the normal retirement age distinguishes their cases from those in which an employee chooses to take early retirement before age 60.[22]

(3) Edmund Lin and Cornelio Kaai

Edmund Lin retired at age 53 with seven years of service and Cornelio Kaai at age 52 with seven years of service. Neither of them satisfied the 10-year period for minimum vesting under the plan and section 203 of ERISA. Therefore, their benefits are not protected against forfeiture under ERISA.

However, defendants also claim that the offset provision is unenforceable because it violates the policy of the State of Hawaii. Specifically, defendants base their claim on a

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[22] The legislative history indicates that ERISA is not intended to protect against forfeiture those employees choosing early retirement. "Also, the accrued benefit does not include the value of the right to receive early retirement benefits, ..." H.R. Rep. No. 93-1280, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Admin. News 5038, 5054. This provision of ERISA was the basis of this Court's decision in *Capocci* v. *General Motors Corp.*, 444 F. Supp. 1306 (D. Hawaii 1978), that early retirement benefits are not protected against forfeiture under ERISA.

decision of the Labor and Industrial Relations Appeal Board of the State of Hawaii. The company appealed the award of workers' compensation benefits to Mrs. Pascoe using the offset provision as the basis of its appeal. The company argued to the Appeals Board that it should be allowed to offset pension benefits against workers' compensation benefits—the reverse of the argument made here. Because of the offset provision, the company sought to relieve itself of the obligation under state law to pay workers' compensation benefits. In denying the appeal, the Board stated:

> "Hawaiian Telephone Company seeks to be relieved of its workers' compensation liability to Mrs. Pascoe because the Rules and Regulations of the Retirement System of the Hawaiian Telephone Company state that moneys paid pursuant to the compensation law are to be offset against benefits payable under the retirement plan from Company contributions. In effect, it is attempting to invoke the Board's aid in the enforcement of the retirement system's rules. The strong policy expressed in Chapter 386 against diminution or cancellation of compensation liability through any means, however, precludes the Board from granting the relief sought. See: §§ 386-9, 386-57, and 386-129."[24]

The clear language of Hawaii Rev. Stat. § 386-9 (1976) alone appears to rule out any such offset provision. Section 386-9 reads:

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[23] *See* note 2, *supra.*

[24] Decision and Order of Appeals Board at 3, *see* note 3, *supra.*

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> Contracting out forbidden. Except as provided in § 386-78, no contract, rule, regulation or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this chapter.[25]

Plaintiffs are obligated under state law to pay any workers' compensation benefits awarded and are obligated by their pension plan to pay pension benefits. In their reply to defendants' motion for summary judgment, plaintiffs dismiss defendants' arguments based on state law as "wholly without merit because Plaintiffs are offsetting pension benefits, not workers' compensation benefits." The problem is that plaintiffs characterize the benefits in question as either workers' compensation benefits (to the Appeals Board) or as pension benefits (to this Court) to suit their arguments at the moment. This leaves the recipients in a carefully constructed Catch 22 in making any claims of entitlement to both benefits.

By including the offset provision in the plan and raising ERISA as support for the provision's validity, plaintiffs are attempting to accomplish indirectly what they cannot accomplish directly. Plaintiffs are required by state law to pay workers' compensation benefits. In distinguishing the same situation in *Utility Workers, supra,* from one in which contractually-incurred severance pay was offset against pension benefits, the court in *Spitzler* v. *New York Post Corp.,* 476 F. Supp. 386, 389 (S.D.N.Y. 1979), pointed out:

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[25] Section 386-78 covers compromises of claims. The exception is not applicable here.

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> The present case differs from *Utility* in one very critical respect. In *Utility*, the workmen's compensation benefit was required by state law; thus, these payments could not be reduced. Instead, the defendant in *Utility* reduced the pension entitlement which was forbidden by ERISA. In the instant case, these severance payments are not required by law. They are purely contractual in nature.

The clear policy of the State of Hawaii to prevent employers from taking any action to reduce their obligations to pay workers' compensation benefits bars any relief declaring that the offset is valid or that plaintiffs have the right to the return of money.[26]

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[26] Any possible issue of federal pre-emption of ERISA of the state workers' compensation law is precluded by the language of ERISA. Section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1975), provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

Section 4 of ERISA, 29 U.S.C. § 1003(b)(3) (1975), provides:

> The provisions of this subchapter shall not apply to any employee benefit plan if—
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

Cf. Standard Oil of California v. *Agsalud*, No. 78-1095 (9th Cir. Oct. 15, 1980), aff'g 442 F.Supp. 695 (N.D. Cal., 1977).

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Accordingly, IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is DENIED except as to the application of ERISA to defendant Pascoe and as to a declaration that application of the offset to defendants Lin and Kaai does not constittue a prohibited forfeiture under ERISA as to which partial summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as to a declaration that the offset provision in the Hawaiian Telephone pension plan constitutes a forfeiture under ERISA except as to defendant Pascoe.

IT IS FURTHER ORDERED that the defendants' motion for summary judgment is GRANTED as to a declaration that the offset as applied eto defendant Young is prohibited under ERISA and state law.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as to a declaration that the offset as applied to defendants Yee and Jeremiah is invalid as to any offset carried out after Yee and Jeremiah reach the age of 60. Also, at plaintiffs' option, Yee's and Jeremiah's disability benefits must be treated as normal retirement benefits at age 60 or be converted to either Service Retirement Allowances at age 60 if the employee chooses that age or vested Retirement Allowances at age 65 if the employee chooses the later age. Any of these benefits must be treated as a normal retirement benefits subject to the nonforfeiture provisions.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as to a declaration that the offset provision in the Hawaiian Telephone pension plan

violates the Hawaii Workers' Compensation Law as to all defendants.

DATED: Honolulu, Hawaii, December 15, 1980.

Samuel P. King
United States District Judge

Civil No. 78-0483
The Employee Benefits Committee
of the Retirement System of
Hawaiian Telephone Company, et al.
v. Eleanor Pascoe, et al.—
Memorandum and Order

No. 80-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioners,

v.

THE GENERAL MOTORS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION OF ERISA INDUSTRY COMMITTEE (ERIC) FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT AND BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF THE RESPONDENT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The ERISA Industry Committee (ERIC), a non-profit corporation of 1919 Pennsylvania Avenue, N.W., Washington, D.C. 20006, respectfully moves this Court, pursuant to Rule 36 of the United States Supreme Court, for permission to file the attached brief *amicus curiae* for the reasons set forth below, which also disclose the interest of the *amicus*.

1. This motion is necessitated by the refusal of the Petitioners to consent to the filing of a brief by ERIC as *amicus curiae*.

2. The ERISA Industry Committee (ERIC) is a nonprofit corporation whose members constitute an association of more than 100 major corporations engaged in a wide cross-section of American business, each of which maintains one or more retirement plans for the benefit of their employees. In all, the companies represented in ERIC maintain a total of over 750 separate retirement plans which presently pay benefits to some 1.5 million retirees and other beneficiaries. The approximately 8.5 million participants (employees, retirees, and other beneficiaries) of retirement plans sponsored by ERIC members represent about 20 percent of all participants in private pension plans.[1] Thus, ERIC views are representative of a wide cross-section of major retirement plan sponsors in the private plan community. Through ERIC, these companies coordinate their views and provide practical information and recommendations to government on how the private pension system functions, and on the impact of government regulations and interpretations under the Employee Re-

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[1] Comprehensive data regarding private pension programs and participants covered by them is not available. The statistics cited herein regarding plans of ERIC members have been principally derived from the Plan Descriptions (Forms EBS-1) filed with the Labor Department. It is generally accepted that there are somewhere between 30 and 45 million participants in private pension programs. *See, e.g.*, H.R. Rep. No. 807, 93d Cong., 2d Sess. 3 (1974); S. Rep. No. 383, 93d Cong., 1st Sess. 2-3 (1973); Statement of Gregory J. Ahart, Director, Human Resources Division, United States General Accounting Office, Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, Comm. Pub. No. 95-138, 95th Cong., 2d Sess. 5-6 (Feb. 27, 1978).

tirement Income Security Act of 1974 ("ERISA") on pension plan participants and plan sponsors.

3. Many of the ERIC members maintain qualified pension plans containing provisions authorizing the integration of workers' compensation benefits with pension plan benefits, the validity of which is to be determined by this Court.

4. The validity of such provisions is of great importance to ERIC members in that any holding that such benefit integration provisions are unlawful could well threaten the stability of private pension plans and their capability to provide real benefits to participants.

5. The views of *amicus* ERIC are particularly important in this action because of the large number of plan sponsors represented by this organization. This case involves significant matters of policy in the private pension system and presents important questions of first impression involving interpretations of ERISA.

WHEREFORE, the ERISA Industry Committee respectfully moves for permission to file the attached brief *amicus curiae*.

Respectfully submitted,

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ERISA Industry Committee

Dated: January 30, 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-193

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,
Petitioners,

v.

THE GENERAL MOTORS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF THE RESPONDENT

The ERISA Industry Committee (ERIC) hereby submits this brief in Case No. 80-193 urging affirmance of the decision of the United States Court of Appeals for the Third Circuit entered in this case on February 15, 1980.

INTEREST OF THE *AMICUS CURIAE*

A statement describing ERIC and its interest in this case is set forth in the preceding motion requesting leave to file this brief *amicus curiae.*

POSITION OF THE *AMICUS CURIAE*

The opinion below asserts the proposition that ERISA § 203(a), 29 U.S.C. § 1053(a) does not preclude the integration of workers' compensation benefits with benefits payable under an employer's private pension plan. The opinion below also held that a state statute prohibiting private pension plans from integrating benefits payable thereunder with workers' compensation benefits is preempted by ERISA § 514(a), 29 U.S.C. § 1144(a). ERISA § 203(a), 29 U.S.C. § 1053(a), sets forth the vesting requirements that must be satisfied by ERISA-covered employees. Section 203(a) and its counterpart in the Internal Revenue Code ("I.R.C."), § 411, 26 U.S.C. § 411, do not govern the structure of the accrued benefit. Rather I.R.C. § 401(a)(5), 26 U.S.C. § 401(a)(5) authorizes the integration of social security benefits and workers' compensation benefits with private pension plan benefits. Furthermore, ERISA § 514, 29 U.S.C. § 1144 provides that ERISA preempts any and all state laws that purport to regulate the terms and conditions of an ERISA-covered employee benefit plan. Thus the lower court decision correctly interpreted the statutory provisions of ERISA relating to nonforfeiture, the accrued benefit and preemption.

The decision of the Court of Appeals for the Third Circuit below presents important questions of fed-

eral law concerning the interpretation of the nonforfeiture provisions of ERISA and the preemptive effects of ERISA upon a state's power to regulate terms and conditions of private employee benefit plans. It is the position of this *Amicus Curiae* that the lower court correctly interpreted ERISA statutory provisions and correctly recognized the preemptive effect of the federal Act. If the lower court decision in *Buczynski* is not upheld it will have a significant impact on plan sponsors and may well affect the stability of the private pension system, a system that allows private employers to voluntarily establish pension plans to provide income to employees during retirement. Such system should be interpreted to encourage, rather than discourage, employers to establish employee pension plans.

Any interpretation of ERISA § 203(a), 29 U.S.C. § 1053(a), that results in barring the integration of workers' compensation benefits and pension plan benefits, thus allowing duplication of benefits, could create a chilling effect and thus discourage employers from establishing private pension plans or raising benefit levels of existing pension plans.

Further, under ERISA's preemption provision, Congress sought to avoid the existing voluminous litigation involving pension plans and conflicting state laws such as N.J. Stat. Ann. 34:15-29 as amended by Chapter 156 of the Laws of 1977 of the State of New Jersey. The broad preemption provisions of ERISA were intended to provide a uniform basis of federal regulation so that plan sponsors, such as those represented in ERIC, who generally operate uniform employee benefit programs for their employees which cross state boundaries, would be gov-

erned by only one set of laws. ERIC members are deeply concerned that if the lower court decision is not upheld, the intent of Congress to create and support a uniform scheme regulating employee benefits will be frustrated. To subject pension plans to the varying laws of 50 state jurisdictions will invariably result in a fragmented scheme of conflicting federal and state regulation of employee benefit plans, an evil which Congress intended to avoid with ERISA's preemption provisions.

The explicit language of ERISA and the broad scope of the preemption provisions were intended to avoid conflicts in laws which result in piecemeal regulation of employee plans. In the final analysis, the victims of a fragmented scheme of federal and multistate regulation of benefit plans are likely to be employees. Already faced with mounting costs, unwieldy administrative burdens and proliferating litigation, some sponsors will be forced to utilize plan assets, otherwise earmarked for benefits, to meet the expenses caused by a fragmented scheme of regulation. Other plan sponsors may actually curtail the level of benefits provided to employees.

SUMMARY OF ARGUMENT

Amicus ERIC does not seek herein to comprehensively analyze the statutory provisions and legislative history of ERISA relating to nonforfeiture and provisions of the I.R.C. authorizing the integration of workers' compensation benefits with private pension plan benefits. Rather, this brief sets forth the policy arguments justifying such benefit integration and emphasizes that ERISA must be interpreted with consideration given to Congressional intent to pro-

vide a favorable setting for the growth and development of private pension plans. It is axiomatic that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally pay all costs.

Amicus ERIC emphasizes that Congress intended the broadest possible federal preemption in the enactment of ERISA § 514, 29 U.S.C. § 1144, as its legislative history clearly shows. Thus, provisions of Chapter 156 of the Laws of 1977 of the State of New Jersey purporting to preclude the integration of workers' compensation benefits with normal retirement pension benefits must be preempted and cannot be permitted to impact the terms and conditions of private pension plans.

ARGUMENT

I. ERISA § 203(a) Does Not Preclude the Integration of Workers' Compensation Benefits With Private Pension Plan Benefits

Section 165(a)(5) of the Internal Revenue Code of 1939 expressly authorized private pension plans to take into account social security benefits and other "retirement benefits created under State or Federal law." Section 165(a)(5) continues in existence as § 401(a)(5) of the 1954 Internal Revenue Code, 26 U.S.C. § 401(a)(5).

I.R.C. § 401(a)(5) provided prior to the enactment of ERISA and continues to provide that a plan will not be considered discriminatory merely because contributions or benefits of or on behalf of employees under the plan "differ because of any retirement benefits created under State or Federal law." In 1968

the Internal Revenue Service in defining the phrase "retirement benefits under State or Federal law" held that "benefits payable under a workmen's compensation law or occupational diseases law . . . are acceptable as an offset against benefits payable under a qualified pension plan." *See* Rev. Rul. 68-243, 1968-1 C.B. 167. The substance of Rev. Rul. 68-243 was incorporated in the 1972 edition of the "Guides for Qualification of Pension, Profit Sharing and Stock Bonus Plan," IRS Publication 778.

Congress in enacting ERISA specifically intended that antidiscrimination rules in effect prior to the enactment of ERISA remain in effect. The Conference Committee Report provided:

> Moreover, the conferees intend that the antidiscrimination rules of present law in areas other than the vesting schedule are not to be changed. Thus, the present antidiscrimination rules with respect to coverage, and with respect to contributions and benefits are to remain in effect. Also, the antidiscrimination rules may be applied with respect to benefit accruals.

H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 277 (1974), *reprinted in* Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976), Vol. III, at 4544 [hereinafter cited as ERISA Leg. Hist.].

Subsequent to the enactment of ERISA the Secretary of the Treasury confirmed by regulation:

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact

> that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

26 C.F.R. § 1.411(a)-4(a) (1979).

The Internal Revenue Service in Rev. Rul. 78-178, 1978-1 C.B. 117, left no doubt that workers' compensation benefits may be integrated with private pension plan benefits.

Any determination of the validity of the regulation must initially concern its character. Both the lower court, and the United States Court of Appeals for the Sixth Circuit in *Utility Workers Union of America, AFL-CIO* v. *Consumers Power Co.*, No. 78-1402 (6th Cir., filed Jan. 6, 1981), *petition for reconsideration en banc pending*, recognized the Treasury Regulation as legislative in character rather than an interpretative regulation:

> In the recent case of *General Motors* v. *Buha*, —— F.2d —— (6th Cir. 1980), this Circuit held that Treasury Regulation § 1.401(a)-13 was a legislative rather than an interpretative regulation, and that as such the regulation was entitled to considerable deference by the judiciary. (Regulation § 1.401(a)-(13) was issued pursuant to the authority of 29 U.S.C. § 1202 (c), the section that is the authoritative basis for Treasury Regulation § 1.401-4(6) and § 1.411 (a)-4(a), *supra.*)

Id., slip. op. at 12.

Further, both the lower court and the Sixth Circuit in *Consumers Power* agreed that all Treasury

interpretations, legislative or otherwise, must be set aside if the interpretation is " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977).

The Court in *Consumers Power*, *supra*, thereafter reached the erronoeus conclusion that interpretation of the Treasury, allowing integration of workers' compensation benefits with private pension plan benefits, was "at odds both with the statutory language of ERISA and with its legislative history." *Utility Workers Union of America, AFL-CIO* v. *Consumers Power Co.*, *supra*, slip op. at 13. In reaching this conclusion the Sixth Circuit failed to recognize I.R.C. § 401(a)(5) as authority for both social security integration and workers' compensation benefit integration. Rather, the *Consumers Power* court found that I.R.C. § 401(a)(15), 26 U.S.C. § 401(a)(15), impliedly authorized integration of social security benefits with private pension plan benefits. *Id.*, slip op. at 8. Thus, the Sixth Circuit reasoned: "certain offsets (i.e., offsets that are comparable to an offset for social security payments) are reductions in benefits that do not violate the vesting requirements of section 203." *Id.*, slip op. at 8.

Next the Sixth Circuit failed to consider workers' compensation benefits and social security benefits "like" benefits for purposes of ERISA. *Id.*, slip op. at 17. The Court apparently took no notice of its prior decision in *Lofty* v. *Richardson*, 440 F.2d 1144 (6th Cir.), *cert. denied*, 404 U.S. 985 (1971), reaching the opposite result.

The Court in *Lofty* v. *Richardson* upheld the integration of workers' compensation benefits with so-

cial security benefits authorized by 42 U.S.C. § 424a and defended such integration by recognizing the similarity between benefits:

> Finally, it is entirely conceivable to us that Congress may have considered Social Security benefits and Workmen's Compensation benefits to be more arguably duplicative of one another than could appropriately be claimed concerning Social Security benefits and the other two types of payments. Both Social Security and Workmen's Compensation programs are social welfare legislation. Private accident or disability insurance is a private contract, frequently paid for entirely by the recipient. And, of course, court awards for injuries are private rights derived from the common law involving the principle of compensation for negligence or fault.
>
> Most of the argument for the Workmen's Compensation off-set came from employers who generally pay all of the costs for Workmen's Compensation and half of the costs of the Social Security benefits. Their argument before Congress was that they were paying twice for the same injury. This argument would have, of course, no merit at all in relation to a damage action award or to the proceeds of privately purchased accident or disability insurance.

440 F.2d 1144, 1151-2. Arguably, had the Sixth Circuit in *Consumers Power*, *supra*, followed its rationale in *Lofty* v. *Richardson*, it would have reached the opposite result upholding the validity of integration of workers' compensation benefits with private pension benefits.

The integration of workers' compensation benefits with pension benefits is clearly consistent with the

provisions of ERISA and its legislative history. Workers' compensation statutes provide benefits to disabled employees when the disability occurs in the course of employment. The benefits are payable regardless of employee fault. The workers' compensation benefit generally is fully funded by the employer. On the other hand, only one-half of the cost of social security benefits is paid by the employer.

Because workers' compensation generally is "no fault" legislation and thus may provide benefits to a disabled employee who became so through his own negligence, no distinction should be made between disabilities arising from employment and those arising outside of employment. The individual who becomes disabled in the course of employment should not receive more in retirement benefits than the individual who becomes disabled as a result of a non-work related injury.

Furthermore, if the employer is permitted to integrate private pension plan benefits with social security benefits, including social security disability payments, more justification exists for integration of workers' compensation benefits with pension benefits because workers' compensation is fully funded by the employer. Additionally, the establishment of private pension plans and the determination of benefit levels therein is voluntary. If the employer is not allowed to structure the accrued benefit to avoid duplication of benefits resulting in higher income while not working than while working, the incentive to establish plans will diminish. *See Lofty* v. *Richardson, supra,* 440 F.2d 1144, 1149, Chart I.

Accordingly, *Amicus* ERIC contends that the lower court decision should be affirmed and that the hold-

ing that ERISA § 203(a), 29 U.S.C. § 1053(a) does not preclude the integration of workers' compensation with private pension benefits as authorized by I.R.C. § 401(a)(5), 26 U.S.C. § 401(a)(5) is correct, consistent with ERISA statutory provisions and its legislative history.

II. ERISA Preempts State Regulation of Employee Benefit Plans Including N.J. Stat. Ann. 34:15-29, As Amended By Chapter 156 of the Laws of 1977 of the State of New Jersey, Purporting to Preclude the Integration of Workers' Compensation Benefits With Normal Retirement Benefits

On July 14, 1977, the New Jersey legislature enacted Chapter 156 of the Laws of 1977 (Chapter 156), amending N.J. Stat. Ann. 34:15-29 to include a provision that:

> The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

Amicus ERIC contends that this legislation represents an invalid attempt to regulate ERISA covered employee pension benefit plans. Such regulation is preempted by Congress through the enactment of ERISA.

ERISA's broad preemption provision is set forth in Section 514, 29 U.S.C. § 1144, which provides:

> (a) [T]he provisions of this title (Title I) and Title IV shall supersede *any and all State laws* insofar as they may now or hereafter relate to any employee benefit plan described in Section 4(a) and not exempt under Section 4(b).
>
> * * * *

> (c) For purposes of this section: (1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.
>
> * * * *
>
> (2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate directly or indirectly, the terms and conditions of employee benefit plans covered by this title.* (Emphasis added.)

The phrase "any and all" found in Section 514 plainly indicates an intention to preempt *every* state statute, rule or action that fits the description of "relating to" an employee benefit plan. *National Carriers' Conference Committee* v. *Heffernan*, 454 F.Supp. 914 (D. Conn. 1978). A state statute attempting to regulate the structure of the accrued benefit of an ERISA-covered pension plan most assuredly "relates to" the plan.

As this Court has recently stated, "[L]ogic and precedent dictate that '[t]he starting point in every case governing construction of a statute is the language itself.'" *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The language of ERISA on its face clearly evidences Congress' intent to preempt any state law, including the New Jersey law in question here, which relates to employee benefit plans.

The broad preemptive thrust of Section 514(a) is explicitly limited only by Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), which contains certain specific exceptions relating to state insurance, banking and securities laws which are not relevant here.

Any argument that ERISA preemption provisions should be narrowly construed cannot stand; as stated by the federal court in *National Carriers'*, *supra*, 451 F.Supp. at 915:

> The contention that ERISA preemption should be narrowly construed . . . is undermined by Congress' specific identification of areas of state legislation that were not to be preempted.

The broad scope of ERISA's preemption provisions is further clearly underscored by the extensive ERISA legislative history [1] as enunciated by the explicit statements of Senator Williams, Senator Javits and Congressman Dent, the principal drafters of ERISA.[2] This legislative history, along with federal interpretations [3] confirms the major reasons for broad preemption: (1) the need to prevent conflicting regulations over interstate plans, (2) the desire to avoid the litigation that would result from piecemeal preemption, and (3) the emergence of a pervasive fed-

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[1] ERISA was the culmination of years of intense study, investigation, hearings and debates which involved three Cabinet departments, four Congressional committees, and countless employee organizations, associations, corporations, and private citizens, as well as State officials. A substantial portion of the Congressional testimony dealt with the preemption issue. *See Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294, 1298 & n.12 (N.D. Cal. 1977), *aff'd*, 571 F. 2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

[2] ERISA Leg. Hist., Vol. III, at 4670, 4745, 4770, quoting Congressman Dent, Senator Williams, and Senator Javits, respectively.

[3] *See* U.S. Dep't of Labor Opinion Letter (P/Opinion 76-90) (July 14, 1976), set forth in full, *infra*, in an appendix to this *amicus* brief.

eral interest in employee benefit plans.[4] Moreover, the courts have consistently interpreted the preemption provision in its "broadest sense." [5]

Accordingly, the simple and straightforward meaning of Section 514(a) is that Title I and IV of ERISA, by their very existence, end the operative effect of any and all State laws relating to employee benefit plans. Accordingly, ERISA has preempted New Jersey law purporting to preclude the integra-

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[4] ERISA requires federal reporting and disclosure to employees (29 U.S.C. §§ 1021-1026), and imposition of fiduciary duties upon plan administrators (29 U.S.C. § 1104-1106, 1109, 1111 and 1112). ERISA also provides criminal penalties and civil enforcement (29 U.S.C. §§ 1131-1132), requires that plans be established pursuant to a written contract (29 U.S.C. § 1102(a)), and includes procedures for allocation of administrative responsibilities and payment of funds into and out of the plan (29 U.S.C. § 1102(b)). Moreover, all funds are required to be held in trust (29 U.S.C. § 1103), and the trustees are prohibited from engaging in certain transactions involving plan assets (29 U.S.C. §§ 1106-1107).

[5] Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); Standard Oil Co. v. Agsalud, —— F.2d ——, 318 Pens. Rep. (BNA) D-1 (9th Cir. 1980); Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); Bell v. Employee Security Benefit Ass'n, 437 F. Supp. 382, 385-88 (D. Kan. 1977); Wayne Chemical, Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316, 321 (N.D. Ind.), *aff'd as modified*, 567 F.2d 692 (7th Cir. 1977); Azzaro v. Harnett, 414 F. Supp. 473, 474 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977); Pervel Indus., Inc. v. Connecticut Comm'n on Human Rights & Opportunities, 603 F.2d 214 (2d Cir. 1979), *aff'g mem.* 468 F. Supp. 490 (D. Conn. 1978), *cert. denied*, 444 U.S. 1031 (1980).

tion of workers' compensation benefits and private pension benefits.

CONCLUSION

The lower court's decision is consistent with provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, consistent with its legislative history and consistent with provisions of the Internal Revenue Code and Treasury Regulations promulgated thereunder.

For all the foregoing reasons, this *Amicus Curiae* respectfully urges this Court to uphold the decision of the lower court.

Respectfully submitted,

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Dated: January 30, 1981

APPENDIX

P/OPINION 76-90

DEPT. OF LABOR
Letter of Opinion

RE: California

July 14, 1976

Dear

It has been brought to the attention of this office that the (Named) Health Care Service Plan Act of 1976, has recently gone into effect in the state of (deleted). We have undertaken a comprehensive review of the (Named) Act, and have noted your tentative conclusion, as stated in your April 16, 1976 Notice of Hearing, that "*employer 'self-insured'* or 'self-administered' health care plans for employees are health care service plans subject to licensing under the Act." (Emphasis in the Notice of Hearing).

The Department of Labor is charged with administration and enforcement of certain provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* Among such provisions is § 514(a) of ERISA which provides:

EFFECT ON OTHER LAWS

> Sec. 514(a) Except as provided in subsection (b) of this section, the provisions of this title and Title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

The effect of this section is to preempt all state laws which *relate to* employee benefit plans subject to the coverage of Title I or ERISA (Protection of Employee Benefit Rights), whether such state laws conflict with the terms of the federal legislation or would merely supplement the federal scheme. The coverage of ERISA extends to employee benefit plans established or maintained by employers engaged in commerce, or by employee organizations representing employees so engaged. ERISA § 4(a). The term "employee benefit plan" encompasses both pension plans and welfare plans. Included in the definition of welfare plans found in § 3(1) of ERISA are plans established or maintained by employers or employee organizations, or both, for the purpose of providing "medical, surgical or hospital care or benefits" to their participants and beneficiaries.

The (Named) Act may be read, particularly in conjunction with your April 16, 1976 *Notice*, to be applicable to employee welfare benefit plans now subject to the coverage of ERISA. It is the view of the Department of Labor that to the extent that the (Named) Act may be applicable by its terms to such ERISA-covered plans, the Act is preempted by § 514 of ERISA. The reasons for broad preemption of State laws under ERISA were succinctly stated by Senator Williams, a major sponsor and floor manager of the bill, during its final consideration.

> Both the House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House Bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the

> validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension plans not clearly connected to the Federal regulatory scheme. Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required —but for certain exceptions—the displacement of State action in the field of private employee benefit programs. 120 Cong. Rec. S15751 (daily ed. Aug. 22, 1974).

The major reasons for broad preemption disclosed in these remarks include (1) the need to prevent conflicting regulation over interstate plans, (2) the desire to avoid the litigation that would result from piecemeal preemption, (3) the emergence of a pervasive Federal interest in employee benefit plans, and (4) the existence of a comprehensive federal program for future study (see § 3022).

The (Named) Act is replete with provisions of the type that gave rise to these concerns. They include, but are not limited to, specification of mandatory health care services and coverage (§ 513671, 1373(c) and (d); annual reporting requirements (§§ 1371, 1383); approval of plan financial responsibility (§ 1372); and regulatory authority to control handling of plan assets (§ 1376). Most troublesome is the overall requirement that plans subject to the Act must be licensed and approved by the State.

Should it be determined that the (Named) Act is applicable by its terms to employee welfare benefit plans subject to the coverage of ERISA, the nature of the former would mandate a conclusion that it is a state law relating to employee benefit plans within the meaning of § 514 of ERISA. As such, the (Named) Act would be preempted by ERISA to the extent it would otherwise be applicable to ERISA-covered plans.

I hope that this information and the expression of our views will be of assistance to you in your implementation of the (Named) Act within the limits of federal law. I would appreciate an expression of your response to the position outlined above.

Sincerely,

No. 80-193
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

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Petitioners,

vs.

THE GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF THE PETITIONERS

MOTION OF GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Gray Panthers respectfully move this court, pursuant to Supreme Court

Rule 36, for leave to file the accompanying brief in this matter as amicus curiae in support of the petitioners in this case. In support of this motion, the Gray Panthers show as follows:

1. The respondent in this action has refused to consent to the Gray Panthers filing an amicus curiae brief in support of the petitioners.

2. Amicus Gray Panthers is a national organization whose membership is composed of both young and old persons throughout the United States who seek to reform and improve institutions and laws that affect the lives of senior citizens. The Gray Panthers have taken a special interest and concern with the structure of the private pension industry in the United States and its impact on older persons.

3. Of particular importance to the Gray Panthers is the scope and meaning of the Employee Retirement Income Security Act of 1974. The Gray Panthers believe that this Act must be interpreted so as to secure pensions for workers and their families and not as a method of depriving persons of their earned retirement

benefits. In support of their views, the Gray Panthers have participated as amicus curiae in many cases where the courts have been called upon to interpret the congressional intent which underlies ERISA. These cases include Daniel v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 551 F.2d 1223 (7th Cir. 1977), rev'd 439 U.S. 551 (1979); Hewlett-Packard Company v. Barnes, 571 F.2d 562 (9th Cir. 1976); and Stone v. Stone, 450 F.Supp. 919 (N.D.Cal. 1978), aff'd --- F.2d --- (September 29, 1980, 9th Cir.). In addition, the Gray Panthers participated as amicus curiae in the decision below of the United States Court of Appeals for the Third Circuit and in the cases of Utility Workers of America v. Consumers Power Company, 453 F.Supp. 447 (E.D.Mich. 1978), appeal pending, Court of Appeals No. 78-1402 (6th Cir.), and Server v. Interpace Corporation, appeal pending, Court of Appeals No. 79-3832 (9th Cir.), all of which involve the same issue that is before the court in this matter.

4. The views of amicus Gray Panthers

are particularly important in this action because of the broad spectrum of plan participant interest represented by this organization. Amicus is in fact a unique elderly organization because its members include persons currently employed in work covered by private pension plans, retired workers who have been denied pension benefits because of offsets similar to that at issue herein, and retirees who have been unaffected by these offsets. The Gray Panthers feel it is critical for the views of plan participants - the consumers of the pension industry - to be heard directly by this court.

5. This case involves significant matters of policy in the private pension arena and presents important questions of first impression involving interpretation of ERISA. ERISA is, as this court has recognized, the first attempt by Congress to significantly regulate the private pension industry in the United States. The first attempts by this court to interpret important sections of that statute are likely to have great impact on the future of private pension plans in this

country. Since private pension benefits are an important element of our income maintenance program and retirement plans of our older citizens, their views should be heard by this court on such matters of significant policy.

6. Amicus Gray Panthers further believes that its views are supplemented and aided by the knowledge and experience of its counsel at the National Senior Citizens Law Center and the University of New Mexico. Attorneys from the law center and the university have had extensive involvement with private pension systems solely on behalf of pension consumers. The National Senior Citizens Law Center in fact has represented individual workers and classes of workers in attempts to gain benefits from dozens of major private pension plans in the United States. In addition to litigation, attorneys for the Gray Panthers were actively involved in the congressional deliberations surrounding the passage of ERISA. This experience has given amicus' attorneys a unique perspective on the impact of this decision on the federal government's income maintenance

policies.

WHEREFORE, it is respectfully moved and requested that the Gray Panthers be granted leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE GRAY PANTHERS

Interest of the Amicus

A statement describing the Gray Panthers and their interest in this case is set forth in the preceding motion requesting leave to file this amicus curiae brief.

Summary of Argument

Amicus Gray Panthers do not offer argument on all the issues presented by the parties for resolution by this court. Rather, the points suggested by amicus Gray Panthers are designed to show that Internal Revenue Code § 401(a)(5), 26 U.S.C. § 401(a)(5) (dealing with the integration of Social Security retirement benefits) does not provide the basis for a Worker's Compensation offset exception to the general rule of nonforfeitability contained in ERISA § 203(a), 26 U.S.C. § 1053(a) and its parallel provision, Internal Revenue Code § 411, 26 U.S.C. § 411. Amicus maintains all forfeitures are prohibited except those specifically authorized by § 203 or other sections of ERISA. A Worker's Compensation offset is

no where authorized in ERISA and is thus impermissible.

Amicus Gray Panthers further argue that Congress has never authorized a Worker's Compensation offset under I.R.C. § 401(a)(5). Congress' failure to permit a Worker's Compensation offset is consistent with its historical characterization of such benefits as being distinct from retirement benefits and is consistent with this Court's views reflected in its recent decisions involving private pension benefits.

I. OFFSETS OF WORKER'S COMPENSATION BENEFITS AGAINST VESTED RETIREMENT PENSION BENEFITS ARE FORFEITURES SPECIFICALLY PROHIBITED BY ERISA SECTION 203(a), 29 U.S.C. § 1053(a), AND INTERNAL REVENUE CODE SECTION 411(a), 26 U.S.C. § 411.

A. The language, history and purpose of ERISA show Congress' clear intent to protect workers' pension benefits from forfeiture and to narrowly limit exceptions to the general rule of nonforfeitability; and the only allowable exceptions to ERISA's general rule of nonforfeitability are those contained in ERISA §203 or otherwise explicitly authorized by other sections of ERISA.

ERISA § 203, 29 U.S.C. § 1053,[1/] provides

1/ Internal Revenue Code § 411, 26 U.S.C. § 411, is substantially identical.

in part:

> "(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . ."

Section 203(a)(3) creates four "exceptions", none here pertinent, to the general rule of nonforfeitability.[2/]

ERISA section 3(10), 29 U.S.C. § 1002(19), defines "nonforfeitable" as

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2/ These exceptions cover only the following conditions subsequent:

> (1) the employee's death (unless a joint and survivor annuity is to be provided); (2) the employee's withdrawal of any part of his own mandatory contributions where he is less than 50 percent vested (unless the employee repays the withdrawn contributions with interest); (3) the suspension of payments of benefits attributable to employer contributions during a period in which the employee is re-employed by the same employer under the same plan; and (4) the reduction of the employee's accrued benefit by plan amendment approved by the Secretary of Labor, and only to forestall substantial economic peril to the viability of the plan. (These exceptions were also added to I.R.C. § 411, "Minimum Vesting Standards" for qualification of a trust.)

follows:

> "(19) The term 'nonforfeitable' . . . means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3)." (Emphasis added.)

The broadness and definiteness of the nonforfeitability concept adopted in ERISA was well understood by this Court in its decision last term in Nachman v. Pension Benefit Guarantee Corp., --- U.S. ---, 100 S.Ct. 1723 (1980). The Nachman decision, although ultimately concerning another aspect of ERISA, was premised on this Court's interpretation of 29 U.S.C. § 1002(19). In reaching its conclusion in Nachman, this Court reiterated that the "term 'forfeiture' normally connotes a total loss in consequence of some event . . ." 100 S.Ct., at p. 1732, and that ERISA's nonforfeitability provisions mandate that workers' rights to benefits (except where otherwise explicitly set

forth in the statutes) be "unconditional", 100 S.Ct. 1731.

> "Congress wanted to correct this condition by making sure that if a worker had been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - that he actually receive it." Id., at 1733. (Emphasis supplied.)

The broad rule of nonforfeitability in ERISA employed in Nachman has also consistently been reiterated by the lower federal courts. Thus, in the leading case of Riley v. MEBA Pension Trust, 570 F.2d 406, 409 (2nd Cir. 1977), Judge Friendly states:

> "When § 203(a)(3)(B) provides that certain kinds of suspensions [of pension benefits] are not forfeitures, it necessarily implies that those not falling within its terms are. Cf., Keller v. Graphic Systems of Akron, Inc., 422 F.Supp. 1005, 1008 (N.D.Ohio 1976), (concluding that when ERISA applies, since forfeitures because of post-termination competitive employment are not excepted they are prohibited); 1 CCH Pension Plan Guide, § 2584 (forfeitures for cause). If the language of the statute left any doubt that Riley is entitled to prevail unless the

> conditions of § 203(a)(3)(B)(ii) have been met, this would be removed by the portions of the Conference Report quoted in the margins." (Footnote omitted.)

To the same effect, see Keller v. Graphic Systems of Akron, Inc, 422 F.Supp. 1005, 1008 (N.D.Ohio 1976); Winer v. Edison Brothers Stores Pension Plan and Marshall v. Edison Brothers Stores Pension Plan, consolidated at 447 F.Supp. 836 (E.D.Mo. 1977), aff'd 593 F.2d 307 (8th Cir. 1979); Utility Workers Union of America v. Consumers Power Company, 453 F.Supp. 477 (E.D.Mich. 1978); Buczynski v. General Motors Corporation, 464 F.Supp. 133 (D.N.J. 1978).

The holding of this Court in Nachman and those of other federal courts are buttressed and supported by the legislative history of ERISA. Congress intended a general rule of nonforfeitability of vested retirement pension benefits. Consequently, the House Committee stated:

> "With the limited exceptions noted above, no rights once they are required to be vested may be lost by the employee under any circumstances . . . . For example, a vested benefit is not to be forfeited because the employee

later went to work for a competitor, or in some other way was considered 'disloyal' to the employer." H.Rep. No. 93-807, (1974) U.S. Code Cong. & Admin. News, pp. 4725-6. See also H.Conf.Rep. No. 93-1280, (1974) U.S. Code Cong. & Admin. News, pp. 5052-3.

The Joint Conference Committee further demonstrated Congress' intent in stating that ". . . except as outlined below, an employee's rights, once vested, are not to be forfeitable for any reason." Joint Conference Committee Explanation Statement, (1974) U.S. Code Cong. & Admin. News, pp. 5038, 5052.[3/]

The issue then raised by the present action is whether the Worker's Compensation forfeiture, despite the congressional policy noted above, is otherwise permissible

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3/ The Internal Revenue Service itself has agreed with this understanding of non-forfeitability in ERISA.

"Section 411 of the Internal Revenue Code of 1954 provides that certain benefits must be nonforfeitable. Section 411(a)(3) provides certain exceptions to the nonforfeitability rule. There are no exceptions to the nonforfeitability rule other than those enumerated in § 411(a)(3)." Rev. Rul. 75-480, 1975 - 44 I.R.B.

under ERISA. The Third Circuit, relying on pre-ERISA Internal Revenue Service policy, found that Worker's Compensation forfeitures are comparable to Social Security offsets (generally known as Social Security integration). The court went on to hold that since Social Security integration is a permissible legal forfeiture under I.R.C. § 401(a)(5) (even though not specifically approved by § 203), the Worker's Compensation forfeiture is also valid. Amicus Gray Panthers maintain that respondent's argument is misplaced and not supported by the language or legislative history of ERISA, and that the Third Circuit below erred in its conclusion permitting Worker's Compensation offsets.

In the court below, Judge Garth, writing for the court, premised his arguments on his interpretation of the plaintiffs' contentions. Judge Garth found that the workers could not prevail because their arguments hinged on the fact that all forfeitures are prohibited by § 203 of ERISA, except those stated in § 203 itself. Since Congress approved a Social Security

forfeiture (i.e., Social Security integration) in other sections of ERISA, Judge Garth concluded that § 203 is not, as plaintiffs argued, absolute. As a result, the court below found that there may be other permissible (and, presumably, a limitless number of) forfeitures, such as the Worker's Compensation offset at issue herein.[4/]

The Third Circuit's rendition of the nonforfeitability rule sought by plaintiffs below is, amicus Gray Panthers contend, incorrect. Amicus does not argue that only forfeitures noted in § 203 are valid. Instead, the Gray Panthers contend that in addition to § 203 forfeitures, any other forfeitures specifically adopted by Congress in ERISA are also permissible. Therefore, Social Security forfeitures (integration) are

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4/ The Third Circuit also needs to make at least two other critical assumptions which amicus Gray Panthers dispute. First, the court assumed that Congress did in fact authorize Worker's Compensation offsets prior to ERISA. Second, it finds that Worker's Compensation benefits are similar to retirement pensions and Social Security.

not an implied exception to an absolute rule, but rather a specific congressional directive. On the other hand, there is no statement in ERISA, of any kind, approving Worker's Compensation forfeitures.

The rule that amicus Gray Panthers premises its argument on is that, given the congressional desire embodied in ERISA to severely limit forfeitures of pension benefits, Nachman v. Pension Benefit Guarantee Corporation, supra, all forfeitures are prohibited unless set forth in § 203 or another section of ERISA. Only by adopting this rule can this Court read all sections of ERISA, consistently and as a whole. Had the court below understood these arguments, it could not have reached the same conclusion and instead, Gray Panthers contend, would have supported the pensioners who have brought this action.

If Congress had intended to include Worker's Compensation as an allowable offset or forfeiture, it would have done so specifically. Worker's Compensation offsets is not an area of the law where Congress has historically failed to

legislate in the past. In point of fact, when it deemed appropriate to do so (and not by implication), Congress has specifically legislated that benefits, such as Social Security disability payments, are to be offset by Worker's Compensation benefits. 42 U.S.C. § 424. Congress can specifically and explicitly provide such offsets when it so desires. See Richardson v. Belcher, 404 U.S. 78, 92 S.Ct. 254 (1971) (upholding the Worker's Compensation offset as to Social Security disability).

In addition, given the specifically authorized offset of Worker's Compensation against Social Security disability, it is hard to imagine that Congress intended to provide a double penalty to the injured worker. Cf. Freeman v. Harris, 625 F.2d 1303 (5th Cir. 1980). If the Third Circuit's decision is upheld, however, that is, exactly the result produced. Worker's Compensation could then be offset not only against Social Security disability but also against a worker's vested retirement pension.

Thus, the court below erred by assuming

that if Social Security offsets were permissible under ERISA, so too were Worker's Compensation benefits. Retirement and Social Security offsets are specifically authorized by ERISA (and thus valid exceptions to § 203), but Worker's Compensation offsets have not been specifically authorized by ERISA and cannot be read to be included within the general authority for "retirement" offsets.

B. Internal Revenue Code § 401(a)(5), dealing with a prohibited discrimination in pension benefits, does not provide a Worker's Compensation exception to Congress' clear and unequivocal anti-forfeiture intent and language in ERISA § 203 and I.R.C. § 411.

1. Section 401(a)(5) is intended to allow for integration of pension benefits with Social Security retirement benefits and to avoid prohibited discrimination in the process.

Despite the clear dictates of ERISA noted above, the Third Circuit panel has concluded that pursuant to I.R.C. § 401(a)(5), 26 U.S.C. § 401(a)(5), retirement benefit "offsets" are congressionally authorized and are thus a type of pension

benefit forfeiture allowed in addition to those specifically enumerated in section 203(a)(3) of ERISA. The lower court premised its decision on the belief that Worker's Compensation benefits are "retirement benefits" within the meaning of I.R.C. § 40](a)(5) and are thus permissible forfeitures. Amicus Gray Panthers respectfully disagrees with the lower court's characterization of Worker's Compensation benefits. Instead, amicus contends that Worker's Compensation benefits are not "retirement benefits" within the meaning of I.R.C. § 401(a)(5).

Internal Revenue Code § 401 provides, in pertinent part:

> "(a) . . . Requirements for Qualification. -- A trust * * * forming part of a * * * pension * * * plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section --
>
> * * *
>
> (4) If the contributions or the benefits provided under the plan do not discriminate in favor of employees who are --

(A) officers
(B) shareholders, or
(C) highly compensated. * * *

(5) A classification shall not be considered discriminatory within the meaning of paragraph (4) * * * merely because it excludes employees the whole of whose remuneration constitutes 'wages' under * * * the Federal Insurance Contributions Act * * * Neither shall a plan be considered discriminatory * * * merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from 'wages' * * * [under the Federal Insurance Contributions Act] differ from the contributions or benefits based on employee's remuneration not so excluded, or differ because of any retirement benefits created under State or Federal law."

Both the respondents and the court below would justify their results by relying on the pre-ERISA legislative history of this provision which approves of Social Security integration. Amicus maintains that any attempt to rely on pre-ERISA legislative history is questionable at best and does not provide sufficient support for the conclusions of the court below.

The current status of Worker's Compensation

forfeiture must be evaluated in light of ERISA and that statute's own legislative history. The IRS has itself recognized this need to re-evaluate the meaning of sections of the Internal Revenue Code which were re-enacted by ERISA. In determining the meaning of the anti-discrimination section of the I.R.C., § 401 (which includes the authority for Social Security integration), the IRS has proposed wholly new regulations. See 45 F.R. 24201 (April 19, 1980). These new regulations are needed not because of substantial changes in the wording of the anti-discrimination statute, but because of the congressional intent behind ERISA as reflected in the statutes' legislative history.

This is evidenced by ERISA's adoption for the first time of specific limits on forfeitures of pension benefits. Only forfeitures enumerated in § 203 or specifically authorized in other sections of ERISA now are permissible. Since pre-ERISA statutes do not have comparable provisions, using pre-ERISA legislative history to find the limits

of nonforfeitability is very misleading and wholly inappropriate. As stated before, the Worker's Compensation forfeiture employed in respondent's plan and apparently authorized by IRS regulations does not meet this test and is therefore invalid.

Nevertheless, the legislative history of 26 U.S.C. § 401(a)(5) itself demonstrates that Congress' sole intent from the beginning was only to encourage the establishment of private pension plans which are designed as supplements to benefits available from Social Security. The anti-discrimination provision [§ 401(l)(5)] arose because Congress was particularly concerned that such "integration" not discriminate in favor of officers, stockholders and highly paid employees. H.Rep. No. 2333, 77th Cong., 2d Sess., pp. 50-51, (1942) 2 Cum. Bull. 372, 413.

> "(j) Integration. - Plans which exclude employees who earn less than a specified amount or provide proportionately lesser benefits for such employees may qualify if the benefits under the plan integrate with those provided under

> the social security or similar (e.g., Railroad Retirement Act) program. The total benefits, inclusive of those under the social security or similar program, are used for comparative purposes. If a plan is properly integrated, a classification which excludes all employees who are compensated below the compensation level used for integration purposes will not be considered discriminatory solely because the contributions or benefits based on that part of excluded remuneration differ from contributions or benefits based on that part of remuneration which is not so excluded." Rev. Rul. 65-178, Part 4(5), (1965) Cum.Bull. 294.

In other words, Congress intended to allow for an integrated retirement system where an employee's total retirement package would include Social Security retirement benefits (paid for by employer and employee contributions and computed on the Social Security wage base) and private pension benefits (usually funded solely by employer contributions and computed on wages an employee earned above the Social Security wage base). Since the latter component of the total pension package would benefit only employees earning over

the Social Security wage base, Congress wanted to be certain that such integrated plans would not discriminate in favor of officers, shareholders or highly paid employees. Worker's Compensation offsets were plainly not a factor or consideration for Congress.

The most recent legislative history concerning Social Security integration (accompanying the enactment of ERISA) reiterates Congress' concern solely as to the inequities of pension integration with Social Security. Rather than the flexible, expansive approach characterized by respondents, Congress was in the mood to limit Social Security integration - the only reduction of private pension benefits with which it had ever expressly concerned itself. Thus, Congress added 26 U.S.C. § 401(a)(13) [ERISA § 1201(e)] providing that pension plans may not use subsequent Social Security increases to reduce pension payments to retirees or deferred vested benefits due an employee who leaves prior to retirement. After explaining these changes, House Report No. 93-779 of the House Ways and Means

Committee, (1974) 3 Cum.Bull. 244, at 272, goes on to state:

> "These changes do not affect the ability of plans to use the integration procedures to reduce the benefits that they pay to individuals who are currently covered when social security benefits are liberalized. Your committee, however, believes that such practices raise important issues. On the one hand, the objective of the Congress in increasing social security benefits might be considered to be frustrated to the extent that individuals with low and moderate incomes have their private retirement benefits reduced as a result of the integration procedures. On the other hand, your committee is very much aware that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the rate of frowth of private retirement plans.
>
> In view of the serious issues involved in the integration of private plans with the social security system, your committee believes that it is desirable

to postpone action on this issue pending further study of this problem. More specifically, your committee plans to consider this overall problem again at the earliest opportunity, possibly in connection with future tax reform or social security legislation. However, your committee believes that no further integration of social security and pension benefits should be allowed under any further regulations issued by the Secretary of his delegate at least until June 30, 1975." (Emphasis added.)

See also H.Conf.Rep. No. 93-1280, (1974) 3 Cum.Bull. 415, at 441, and the Supplemental Views of Committee members James Corman and Sam Gibbons, H.Rep. No. 93-779, (1974) 3 Cum.Bull. 409, at 412-13.

Could this same Congress which sought to limit its previously adopted Social Security offset have intended, as the court below concluded, to expand the possibility of offsets into the area of Worker's Compensation? Amicus contends Congress clearly would not have had such intentions.

Thus, even though § 401(a)(5) speaks of "retirement benefits", Congress has always been specifically speaking of

Social Security retirement benefits. It cannot be overemphasized that the only congressional intent discernible from the complete legislative history of 26 U.S.C. § 401(a)(5) is concerned with avoiding prohibited discrimination in the integration of Social Security retirement benefits with private pension benefits. To argue that § 401(a)(5) was intended to also provide an exception to the general rule of nonforfeitability for Worker's Compensation offsets stretches the imagination too far.

2. Worker's Compensation benefits are not "retirement" benefits within the meaning of I.R.C. § 401(a)(5).

This Court has recognized, especially in its recent decisions, the unique nature of retirement benefits. These decisions have characterized retirement pensions, as opposed to Worker's Compensation, as an "additional form of compensation". Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 2723 (1978). Similarly, this court found in Alabama Power Co. v. Davis, 431 U.S. 581, 593 (1977), that "the 'true nature' of the private

pension payment is a reward for length of service."[5/]

Worker's Compensation benefits, on the other hand, can by no stretch of the imagination be considered "retirement" benefits within the meaning of § 401(a)(5). Quite simply stated, retirement pension benefits are payments based on past labor and are deferred wages. (See Inland Steel v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. den. 336 U.S. 960 (1949); President's Commissions on Corporate Pension Funds, Public Policy and Private Pension Programs (1965), at 39; and H.Rep. No. 93-807, Comm. Ways and Means, (1974) U.S. Code Cong. & Admin. News 4719.)

5/ The fact that private retirement pensions are a special and perhaps unique form of compensation has been further underscored by the court's decision in Daniel v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 439 U.S. 551, 99 S.Ct. 790 (1979), and Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802 (1979). In Daniel, the court distinguished pensions from securities, while in Hisquierdo, the court noted that private pension benefits were also different in kind from public (or federal) retirement benefits, 99 S.Ct., at 805, 813 n. 24.

This characterization is underscored by the fact that it is common practice in collective bargaining to consider employer pension contributions as part of the total wage package during wage and benefit negotiations. See McGill, Preservation of Pension Benefit Rights (Pension Research Council, 1972), at 45. Similarly, during the debate on ERISA, the House Ways and Means Committee and Senate Finance Committee clearly recognized the deferred wages nature of retirement pension benefits. See H.R.Rep. No. 93-807, S.Rep. No. 93-383, reprinted in (1974) U.S. Code Cong. & Admin. News 4719, at 4930. The Joint Conference Committee showed that it understood retirement benefits to be different from disability benefits (such as Worker's Compensation). Thus, it stated:

> "Under the conference substitute, the term 'accrued benefits' refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for such expenses), or disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee

> with comparable service under the plan, or to life insurance benefits payable as a lump sum." (1974) U.S. Code Cong. & Admin. News 5054. (Emphasis added.)

Worker's Compensation, on the other hand, is intended to be compensation for hardship due to employment-connected injury and may include recovery for loss of future wages and injury. Stong v. Bucyrus-Erie Co., 472 F.Supp. 1089 (E.D. Wis. 1979), appeal pending No. 80-1755 (7th Cir.); see Larson, Workmen's Compensation, Vol. 1, §§ 1.01-2.30. As Judge Pratt stated in Utility Workers Union v. Consumers Power Co., 453 F.Supp. 447, 455-56 (E.D.Mich. 1978):

> ". . . disability insurance compensates workers for lost income due to non-occupational illness and workmen's compensation laws protect workers against the loss of income due to work-related illness.
>
> * * *
>
> Pensions, in contrast, represent deferred income, or other benefits foregone by the worker in hopes of a more secure retirement." (Citations omitted.)

The distinction between retirement pensions and Worker's Compensation is

further highlighted by the tax treatment received by each -- deferred pension income is taxed as income when paid out and Worker's Compensation is not taxed as income since it is remedial in nature and not income available for retirement. I.R.C. § 104, 26 U.S.C. § 104(a).[6/]

The views of this Court and Congress

6/ Internal Revenue Code § 1.104-1(b), 26 C.F.R. § 1.104(b), states:

> "(b) Amounts received under workmen's compensation acts. Section 104(a)(1) excludes from gross income amounts which are received by an employee under a workmen's compensation act (such as the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 18), or under a statute in the nature of a workmen's compensation act which provides compensation to employees for personal injuries or sickness incurred in the course of employment . . . . However, section 104(a)(1) does not apply to a retirement pension or annuity to the extent that it is determined by reference to the employee's age or length of service, or the employee's prior contributions, even though the employee's retirement is occasioned by an occupational injury or sickness." (Emphasis added.)

have, of course, been supported by the experts in pension analysis and income maintenance theories. Virtually every discussion by such experts of "retirement" income focuses on income available to older individuals from sources on which retirees can plan their retirement in advance. Thus, they have developed the metaphor of the three-legged retirement income stool (savings, Social Security and private pensions) which has been constantly used in discussions of the nature and expectations of our income maintenance system. Worker's Compensation has not been discussed in this light, simply because it is not "retirement" income.

For example, in a recent conference on the "Economics of Aging" held by the National Journal in December, 1978, numerous speakers addressed the question of retirement income for the elderly. Robert Ball, former Commissioner of Social Security and presently senior scholar at the National Academy of Sciences' Institute of Medicine, in describing the present system of retirement income security,

states:

> "We have a system that I like to think of as a four-tier system. One is the nearly universal contributory social security program, and then on top of that are private pension plans and career plans for government employees supplementary social security. On top of that, and quite a different thing, I think, are the savings which individuals make on their own on an individual voluntary basis. And underlying the whole, of course, is the means-tested program of supplemental security income." "The Economics of Aging" in National Journal Conference proceedings, p. 7 (1978).

Mr. Ball's comments reflect the general understanding of those who spoke at the conference and who have written on the subject of "retirement" income. None of the authorities have ever viewed Worker's Compensation as part of any retirement income program. See, e.g. Salisbury, "Retirement Income and the Economy", September 20, 1980, National Journal, at 1584; McGill, Fundamentals of Private Pensions (4th ed. 1979).

Unfortunately, the Third Circuit below failed to recognize this crucial distinction

between pension benefits and Worker's Compensation benefits. The court below presumed it was offsetting benefits which were similar in kind, thus producing a rational result. On the contrary, the Third Circuit's result when viewed in light of the unique nature of pension benefits that has been the underpinning of our nation's income maintenance system and the decisions of this Court produces an illogical result. The pension recipients, petitioners herein, will only receive all the benefits they have earned if the Worker's Compensation offset of respondent's pension plan is voided by this Court.

II. SUMMARY CONCLUSION

For all the reasons stated herein, amicus Gray Panthers urge this Court to reverse the court below and rule in favor of the pension recipients.

Respectfully submitted,

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By GILL DEFORD

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No. 80-193

In the
Supreme Court of the United States
October Term 1980

HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

THE GENERAL MOTORS CORPORATION,

Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE and BRIEF OF AMICI CURIAE MERL D. STONG, CATHERINE BEHR, as Personal Representative of the Estate of Herbert Behr, Deceased, PAUL DE HATE, BURNELL CLOUGH, FRANK E. DOUMONT and ROBERT MILANOVICH

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No. 80-193

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Plaintiffs-Appellants,

v.

THE GENERAL MOTORS CORPORATION

Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Third Cicruit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Now come Merl D. Stong; Catherine Behr, as Personal Representative of the Estate of Herbert Behr, Deceased; Paul De Hate; Burnell Clough; Frank E. Doumont and Robert Milanovich on behalf of themselves and others similarly situated, and hereby move the court, pursuant to Rule 36 of the United States Supreme Court Rules, for leave to file the accompanying brief *amici curiae*. In support of said motion, the above named individuals on behalf of themselves and all others similarly situated, show unto the court:

1. Merl D. Stong and Catherine Behr, as Personal Representative of the Estate of Herbert Behr, Deceased, are participants and/or beneficiaries of the Bucyrus Hourly Employees' Pension Plan and named plaintiffs and class representatives in a class action commenced in the United

States District Court for the Eastern District of Wisconsin, now pending before the United States Court of Appeals for the Seventh Circuit, Case No. 80-1755.

2. Paul De Hate and Burnell Clough are participants and/or beneficiaries of the Pension Plan for Employees Of Consumers Power Company, and named plaintiffs and class representatives in a class action commenced in the Eastern District of Michigan, currently on appeal in the United States Court of Appeals for the Sixth Circuit, Case No. 78-1402.

3. Frank E. Doumont and Robert Milanovich are participants and/or beneficiaries of employer sponsored pension plans and named plaintiffs and class representatives in separate class actions commenced in the United States District Court for the Western District of Pennsylvania, currently on appeal in the United States Court of Appeals for the Third Circuit, Case No. 80-1857.

4. The pension plans in which each of the above individuals is a participant and/or beneficiary provide for the offset of worker's compensation benefits against vested pension benefits. Because of the worker's compensation offset provision contained in the plan, each of the above named individuals and the members of the classes they represent have suffered, and will suffer substantial and even total losses of their vested pension benefits.

5. Each of the actions commenced by the above named individuals on behalf of themselves and others similarly situated allege that the offset of worker's compensation benefits violates various provisions of ERISA. Specifically, it is alleged in each of these pending class actions that the non-forfeitable vested rights provisions (Section 203(a) and Section 2(19) of ERISA, 29 USC §1053 (a) and §1002(19)), the exclusive benefit provision (Section 403(c)(1) of ERISA, 29 USC §1103 (c)(1)) and non-alienation provision (206(d)(1) of ERISA, 29 USC §1056(d)(1)) of ERISA are violated by the application of the plan provisions contained in the various pension plans providing for the offset of vested pension benefits by worker's compensation benefits.

6. In *Stong v. Bucyrus-Erie,* 472 F. Supp. 1088 (ED. Wis. 1979), recon. denied, 481 F.Supp. 760 (ED. Wis. 1979), the

court declared Section 3.11 of the defendant's plan to be in violation of the prohibition against the forfeiture of vested pension benefits found in Section 203(a) and Section 2(19) of ERISA. The court did not decide whether other provisions of ERISA had been violated as alleged in the complaint. Likewise, in *Utility Workers Union v. Consumers Power Company,* 453 F.Supp. 447 (ED. Mich. 1978) the District Court declared Section V-1 of the defendant's plan in violation of Section 203(a) and 2(19) of ERISA. The District Court did not pass upon the alleged violations of the other provisions of ERISA as alleged in the complaint therein. In *Frank E. Doumont v. Shenango, Inc.,* Civil Action No. 78-1367, and *Robert Milanovich v. Jones and Laughlin Steel Corporation,* Civil Action No. 78-1368, and five other class actions filed in the Western District of Pennsylvania, the District Court granted summary judgment in favor of the Defendant Plans on the basis of the Third Circuit decision in *Buczynski v. General Motors Corporation,* 616 F.2d 1238 (3d Cir. 1980). The District Court ruled that, pursuant to *Buczynski, supra,* the Steel Corporations Plans did not violate the anti-forfeiture provisions of ERISA. The individuals named above, both as named plaintiffs in the various actions, and as representatives of all others similarly situated, have a direct and immediate interest in the resolution of the issues presented upon appeal herein, in that a decision in the instant appeal will presumably be dispositive of the above described class actions.

7. In addition to the allegations that the offset provisions violate the vesting and non-forfeitability provisions of ERISA, each of the above actions have alleged that the offset of worker's compensation benefits violates the exclusive benefit provisions of Section 403(c)(1) of ERISA, which issue is not alleged in *Buczynski v. General Motors Corporation* and *Alessi v. Raybestos-Manhattan,* currently pending before this court. Thus, the issue, with respect to Section 403(c)(1) of ERISA will not be presented to the court by the parties to the instant appeal. Said issue is relevant to the disposition of the case and the legality of the offset of vested pension benefits by worker's compensation payments.

WHEREFORE the above named individuals respectfully pray that this Court grant leave to file the attached Brief as *Amici Curiae*.

Dated this 18th day of December, 1980.

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No. 80-193

In The

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HENRY BUCZYNSKI, ALEX BORUSOVIC and OTHER RETIREES SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

THE GENERAL MOTORS CORPORATION,

Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE MERL D. STONG, CATHERINE BEHR, as Personal Representative of the Estate of Herbert Behr, Deceased, PAUL DE HATE, BURNELL CLOUGH, FRANK E. DOUMONT and ROBERT MILANOVICH

INTEREST OF AMICI CURIAE

Each of the above named individuals are participants and beneficiaries of company sponsored pension plans. The pension plans in which each of the individuals is a participant and/or beneficiary provides for the offset of workers compensation benefits against vested pension benefits. Because of the workers compensation offset provisions contained in each of the plans in which the individuals participate, they have all suffered substantial and even total losses of their vested pension benefits. Merl D. Stong and Catherine Behr are named Plaintiffs and class representatives in a class action challenging the offset provision currently pending before the United States Court of Appeals for the Seventh Circuit, Case No. 80-1755. Paul De Hate and Burnell Clough are named Plaintiffs and class representatives in a similar class action currently on appeal in the United States Court of

Appeals for the Sixth Circuit, Case No. 78-1420. Frank E. Doumont and Robert Milanovich are named Plaintiffs and class representatives in separate class actions currently on appeal in the United States Court of Appeals for the Third Circuit, Case No. 80-1857.

Because of the offset provisions in the plans, each of these individuals and the members of the class they represent, have suffered total forfeitures of their pension benefits. For example, employee Herbert Behr retired from the Bucyrus-Erie Company on February 18, 1977 after forty years of employment. At that time he was entitled to receive $314.55 per month as his pension based upon long service with the Bucyrus-Erie Company. On July 29, 1977 Mr. Behr was awarded $866.92 in workers compensation benefits based upon occupational hearing loss incurred in the course of his employment. On September 26, 1977 the Company, based upon those benefits, cut off his pension from October, 1977 to June, 1978. In the interim, on June 15, 1977 Mr. Behr was awarded $14,378.41 in workers compensation benefits by reason of his having sustained a 45% permanent partial disability resulting from an occupational lung disease he incurred as a result of his employment. On January 25, 1978, and again based upon the claimed offset provision, the Company cut off and suspended Mr. Behr's pension until November, 1982. On May 24, 1978 Mr. Behr died by reason of his disability, having never again received the pension he worked forty years to earn.

Paul De Hate retired from the Consumers Power Company with twenty-seven years of service, following knee and spinal injuries for which he received workers disability benefits. Based upon the challenged workers compensation offset provision, he lost his entire $430.00 monthly pension.

Burnell Clough retired with twenty-five years of service effective October, 1976. He currently receives $105.00 a week in workers disability benefits for massive injuries from a 46,000 volt electrocution, but his accrued vested pension of $226.00 has been wiped out by operation of the offset provision.

Each of the other individuals have similarly lost their

vested pension benefits by virtue of the operation of the offset provisions in the plans.

These individuals, on behalf of themselves and all members of the classes which they represent in the various pending litigation have direct and immediate interest in the resolution of the issues on this appeal in that a decision in this appeal would presumably be dispositive of litigation currently pending in the Circuit Courts of Appeal. *Amici* also believe that their extensive research in this area can be of considerable assistance to the Court with respect to the issues presented by the operation of the offset provisions.

In addition to the allegations that the offset provisions violate the vesting and nonforfeitability provisions of ERISA, each of the class actions which the individuals have brought have alleged that the offset of workers compensation benefits violates the exclusive benefit provisions of Section 403(c)(1) of ERISA, which issue was not alleged in *Buczynski v. General Motors Corporation* currently pending before this Court.

SUMMARY OF ARGUMENT

The parties *amici curiae* will not offer argument on each of the issues advanced by Plaintiffs-Appellants in support of their claim that an employer may not offset vested pension benefits due to an employee's workers compensation payments. *Amici* believe that the briefs submitted to this Court by Plaintiffs-Appellants, as well as the decisions of the District Courts of the Eastern District of Wisconsin in *Stong v. Bucyrus-Erie Company,* 472 F.Supp. 1088 (E.D. Wis., 1979) recon. denied 481 F.Supp. 760 (E.D. Wis., 1979) and of the Eastern District of Michigan in *Utility Workers Union v. Consumers Power Co.,* 453 F.Supp. 447 (E.D. Mich, 1978) establish beyond serious question that such offset is an impermissible forfeiture within the meaning of Section 203(a) and 2(19) of ERISA, 29 U.S.C. §1053(a) and §1002(19).

Amici also believe, however, that it is equally clear that such offset provisions violate Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1) in that the offset allows the employer to utilize plan assets to pay its own workers compensation liabilities under State law. The offset provision thus allows

the assets of the plan to inure to the benefit of the employer rather than to the employees either by reducing the Company's funding obligations to the plan, or insulating it from workers compensation liability to injured employees. *Amici* believe that ERISA is entirely consistent in its prohibition of the forfeiture of vested pension benefits and that Section 403(c)(1) of ERISA clearly and literally invalidates the offset of pension benefits by workers compensation benefits.

ARGUMENT

I.

WORKERS COMPENSATION OFFSET PROVISIONS VIOLATE *SECTION 403(c)(1) OF ERISA, 29 U.S.C. §1103(c)(1)*

A. *Offset of vested pension benefits contravenes Section 403(c)(1)'s prohibition against employer utilization of plan assets for its own direct or indirect benefit.*

Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1) provides, with certain exceptions not here pertinent, that:

> "The assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defray reasonable expenses of administering the plan."

Section 403(c)(1) of ERISA actually contains two distinct requirements. First, this Section forbids the use of any plan assets for the direct or indirect benefit or use of an employer. Second, the Section affirmatively requires that the plan assets be held and used for the sole and exclusive purpose of providing benefits to participant-employees of the plan.

The workers compensation offset provisions manifestly violate both of these mandates. In the first place, it is clear that, by virtue of the provisions, the assets of the plan accrue and inure to the benefit of the employer rather than the employees in at least two ways. First, notwithstanding the fact that the pension fund represents deferred wage compensation of employees for their labor, the employer may, in ef-

fect, pay off an unrelated debt out of this fund of employee wages. Thus, every payment the employer makes to satisfy his liability under the workers compensation law proportionately reduces the cost of paying for such pension benefits—a cost borne solely by the employer in a non-contributory plan. Thus, payment of its workers compensation liability, which the employer otherwise owes his employees, allows the Company to satisfy or reduce its funding obligations to the plan dollar-for-dollar. In the case of a retiree, the plan has been funded based upon his past years of service and the amount contributed being actuarially sufficient to pay him a pension for the rest of his life. In the event that he does obtain a subsequent workers compensation award, he receives no pension and thus there are excess funds in the plan which operate in turn to reduce the funding obligation of the same employer.

Secondly, since the offset provision reduces only the pension benefits of those employees who file a successful workers compensation claim against the Company, it strongly deters an employee from filing such a claim. The chilling effect of the offset provision on the exercise by the employees of their statutory workers compensation rights directly benefits the employer by reducing its costs and liabilities for work related injuries to their employees. The mere existence of the offset provision and the threat of its impending implementation results in a reduction of the number of claims made and makes the processing of a workers compensation claim by a retiring employee a futile and senseless act. Since the employer reduces the pension paid dollar-for-dollar, recouping the amount of workers compensation paid, the net effect to the employee asserting a workers compensation claim is that he receives not one additional penny to compensate him for his injury, but has incurred the expense and inconvenience of prevailing on his workers compensation claim. In the final analysis, the employee pays his own workers compensation out of his pension which represents deferred wages he actually earned during his years of service to the Company.

Additionally, this frustrates the public policy attempted to be furthered by the enactment of workers compensation laws. The purpose of State Workers Compensation Acts is "to provide financial and medical benefits to the victims of work connected injuries and their families—regardless of fault, and to allocate the financial burden to the most appropriate source, the employer, and ultimately the consumer of the produce." *Klein Industrial Salvage v. ILHR Department,* 80 Wis.2d 457, 462, 259 N.W.2d 124 (1977); *Brenne v. ILHR Department,* 38 Wis.2d 84, 91, 156 N.W.2d 497 (1968). Manifestly, the existence of the offset provision contained in pension plans frustrates the public policy embodied in the Workers Compensation Acts and, in the final analysis, results in the allocation of the financial burden of "work connected injuries" to the victims and their families rather than the employer as intended.

The other primary public policy underlying statutory workers compensation is that employees accept smaller recoveries than those potentially available at common law in return for coverage of all work-related injuries regardless of fault. The States have limited an employer's liability for the *quid pro quo* of an employee's sure and swift recovery of schedule payments. *Borgnis v. Falk Co.,* 147 Wis. 227, 133 N.W. 209 (1911); *Mulder v. Acme-Cleveland Corp.,* 95 Wis.2d 173, 182, 290 N.W.2d 276 (1980). The existence of the offset provision similarly frustrates this public policy since employees are forced to forego even their recovery of scheduled payments and are still left without a remedy at common law by virtue of the exclusive remedy provisions of the State Workers Compensation Act. In effect, the workers compensation offset denies the employee his statutory remedy, which by law is his exclusive remedy for work connected injuries. Thus, the operation of the provision leaves the injured employee without any remedy whatsoever.

The offset provision thus allows the assets of the plan to inure to the benefit of the employer rather than its employees either by reducing the Company's funding obligation to the plan or insulating it from workers compensation liability to

injured employees while at the same time granting an immunity to the employer from liability at common law. The inescapable fact is that the employer now uses the pension fund, which is created solely out of the deferred compensation of their employees, to avoid or negate its workers compensation liabilities to the same employees. The offset provision in effect prevents an employee from receiving full pension benefits solely because he suffers an involuntary job related injury compensable under the Workers Compensation Law unless he decides not to force his employer to satisfy its workers compensation liability. Thus the employee must choose between receiving compensation for his injury or receiving full retirement benefits which represent deferred actual wages of the employee set aside for his retirement.

B. *Workers compensation is a mere substitute and replacement of common law liability.*

A fundamental error made by Defendant-Appellees and the Secretary of the Treasury is their failure to recognize the relationship between the common law damage action and workers compensation payments under the Workers Compensation Statute. The Wisconsin Workers Compensation Act, Section 102.01, *et seq.*, Wis. Stats., was originally enacted in 1911. The Act was in derogation of the common law action for tortious negligence of a master to his servant. In *Guse v. A.O. Smith Corp.* 260 Wis. 403, 51 N.W.2d 24 (1952), quoting *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911), which held the Wisconsin Compensation Act constitutional, the Wisconsin Court stated:

> "The legislature, in response to a public sentiment which cannot be mistaken, has passed a law which attempts to solve certain very pressing problems which have arisen out of the changed industrial conditions of our time. It has endeavored by this law to provide a way by which employer and employed may . . . escape entirely from that very troublesome and economically absurd luxury known as personal injury litigation, and resort to a system by which every employee . . . may receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules, without a

> lawsuit and without friction . . . the . . .employer . . . can never be mulcted in heavy damages, and will know whenever an employee is injured practically just what must be paid for the injury. Surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employee at any time and obliged to defend common-law actions upon heavy claims unliquidated in their character, the outcome of which actions none can foretell." 260 Wis. at 407

The Courts and the legislatures have clearly recognized that workers compensation is a substitute for, and is in lieu of the employer's common law liability to his employees. As the Wisconsin Court stated in *Guse, supra:*

> "By legislative declaration there has been grafted on the relation of employer and employee . . . certain rights and liabilities in case af accidental injury to the employee. As has been many times stated, *this is a substitute for the liability of the employer at common law . . ."* 260 Wis. at 408

Not only is the remedy afforded by the Compensation Act statutory and exclusive, but as a result of the Act, there is no common law tort liability. *Anderson v. Miller Scrap Iron Co.,* 169 Wis. 106, 170 N.W. 275 (1919).

Thus it is clear that the workers compensation liability and remedy is in lieu of the employer's liability and the employee's remedy at common law. Workers compensation is nothing more than a substitute and replacement for the common law action between master and servant, the only distinction being that traditional common law defenses are made unavailable to the employer in return for which employees "accept smaller recoveries than those potentially available at common law." *Coleman v. American Universal Insurance Co.,* 86 Wis.2d 615, 621, 273 N.W.2d 202 (1979).

The fact that statutory workers compensation represents a mere substitute and replacement of the common law damage action is further reflected in the language utilized in the original statute in the State of Wisconsin, Chapter 50, Laws of 1911. The original statute, in Section 2394-4 Stats. (1911) provided:

> "Liability for the compensation hereinafter provided for, *in lieu of any other liability whatsoever,* shall exist against an employer for any *personal injury* accidentally sustained by his employee or for his death . . ." (Emphasis supplied)

Clearly, this represented a substitution of the statutory remedy of workers compensation for the personal injury liability of an employer at common law.

This relationship between workers compensation and common tort actions is also recognized by the New Jersey Supreme Court in *Renshaw v. United States Pipe and Foundry Co.* 30 N.J. 458, 153 A.2d 673 (1959). The New Jersey Supreme Court stated:

> "Liability for workers' compensation, or the extent thereof, is not based on the impairment of loss of earning power, rather the loss ensuing from personal injury as it detracts from the former efficiency of the workmen's body or its members in the ordinary pursuits of life." 30 N.J. at 465

Unlike the Defendant-Appellees and the Third Circuit below, the District Courts in *Stong v. Bucyrus-Erie Company,* 472 F.Supp. 1088 (E.D. Wis., 1979), recon. denied 481 F.Supp. 760 (E.D. Wis., 1979), currently before the United States Court of Appeals for the Seventh Circuit, No. 80-1755 and *Utility Workers Union v. Consumers Power Co.,* 453 F.Supp. 447 (E.D. Mich., 1978), currently before the United States Court of Appeals for the Sixth Circuit, No. 78-1402 recognized the relationship between workers compensation and traditional tort remedies at common law. In *Stong v. Bucyrus-Erie Co., supra,* the Court stated:

> "Workers' compensation benefits are intended to compensate an employee for suffering a work-related injury and are not intended to supply retirement security . . . A covered employee loses his right to sue his employer in tort and has significant limits placed upon the amount he can recover in exchange for an almost assured recovery . . . It would be an unreasonable interpretation of ERISA . . . to conclude that Congress injected another trade-off into this intricate scheme, forcing an employee with work related injuries to forego relief provided by statute for such injury in order to preserve his retirement benefits." 472 F.Supp at 1094.

Furthermore, in *Utility Workers Union v. Consumers Power Co., supra,* Judge Pratt determined that:

> "Workmen's compensation is a comprehensive *replacement* for traditional tort remedies and their attendant common law defenses . . . This system has

compensatory elements beyond mere wage replacement . . ." 453 F.Supp at 455

The Defendant-Appellees and the Secretary of the Treasury, as well as the Third Circuit below, have not recognized the fact that workers compensation represents a mere statutory substitute for the employer's liability at common law. The Defendant-Appellees' and the Secretary's entire arguments with respect to Treasury Regulations and Revenue Rulings ultimately come back to and hinge upon Revenue Ruling 68-243, C.B. 1968-1, 157, 158. In that Revenue Ruling, the Internal Revenue Service stated:

"Further, section 401(a)(5) of the Code does not provide for the offset of benefits under a qualified plan by disability damages recovered from an employer in a common law action. Such disability damages are not paid under a program similar to the social security program and *offsetting retirement benefits by disability damages of this type would result in the plan being used to satisfy the employer's liability for damages.*" (Emphasis supplied)

This Revenue Ruling goes on to approve the offset of workers compensation benefits, while at the same time disapproving the offset of damages recovered by an employee in a common law action because such an offset "would result in the plan being used to satisfy the employer's liability for damages." Rev. Rul. 68-243, *supra.*

As is demonstrated above, there is no logical distinction between common law liability of an employer to his employees and the statutory liability of the employer, which is merely in lieu and substitution of that common law liability, which would justify a different treatment with respect to the offset of the same as against vested retirement benefits. Clearly, workers compensation benefits are in lieu of the employer's liability for damages at common law. Precisely because workers compensation benefits are nothing more than a limited statutory substitute for the employer's liability at common law, offsetting retirement benefits by workers compensation would likewise "result in the plan being used to satisfy the employer's liability for damages." Rev. Rul. 68-243, *supra.*

Because the offset of workers compensation benefits results in the plan being used to satisfy the employer's

statutory liability for damages, it clearly runs afoul of Section 403(c)(1) of ERISA in that the assets of the plan are used to benefit the employer and not for the exclusive purpose of providing retirement benefits to the participant-employees. There is absolutely no rational reason to allow an offset of the workers compensation remedy for work-connected injuries and to prohibit the offset with respect to the common law remedy which, for all practical purposes, no longer exists. The inescapable fact is that the assets of the plan are being used to satisfy the statutory liability which is in lieu and substitution of liability at common law.

Clearly, even the Internal Revenue Service and its Secretary would find, based upon Revenue Ruling 68-243, that an offset provision in a pension plan offsetting common law damages would violate the "exclusive benefit" provision contained in Section 403(c)(1) of ERISA, 29 U.S.C. §1103(c)(1). It necessarily follows, in light of the true nature of workers compensation and its relation to the employer's common law liability, that the offset of workers compensation benefits likewise violates the "exclusive benefit" provisions of Section 403(c)(1) of ERISA.

In the final analysis, the fundamental error made by Defendant-Appellees and the Secretary of the Treasury, both with respect to vesting under Section 203 of ERISA as well as the "exclusive benefit" provision under Section 403 of ERISA, is a basic failure to understand or appreciate the actual nature and purpose of workers compensation benefits.[1] There can be no serious question but that if the

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[1] It is interesting to note that in the statement of Daniel R. Halperin, Acting Deputy Assistant Secretary (Tax Legislation) before the Subcommittee on Labor of the Senate Human Resources Committee, Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Senate Finance Committee, August 15, 1978, the Secretary, commenting on proposed changes in ERISA, stated:

> "To the extent workers' compensation benefits are not designed as wage replacements, they should not therefore be permitted to offset retirement benefits . . . to the extent the offset workers' compensation is a disincentive to providing a minimum benefit, which is likely, the Treasury Department supports elimination of, or revision of, the offset. *Based on our limited knowledge of workers' compensation,* we support this provision . . ."

offsetting of retirement benefits by common law damages results in the assets of the plan being utilized to satisfy the employer's liability, that a provision offsetting the benefits which were substituted for and in lieu of those common law damages also results in the assets of the plan being utilized to satisfy the employer's liability. The fact that the actual damages are statutory and liquidated, rather than common law and unliquidated does not change the effect of offsetting retirement benefits—the plan is "being used to satisfy the employer's liability for damages" in violation of Section 403(c)(1) of ERISA.

C. *The operation of the offset provision results in a denial of pension benefits which is unlawfully arbitrary and exclusionary.*

The concept and interpretation of "exclusive benefit" under ERISA is derived from earlier decisions under the parallel mandate of Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186(c)(5). Specifically, Section 302 of the Labor Management Relations Act requires that a pension trust be "established for the sole and exclusive benefit of the employees." *Lee v. Nesbitt,* 453 F.2d 1309 (9th Cir., 1972). In *Burroughs v. Pension Trust Fund for Operating Engineers,* 542 F.2d 1128 (9th Cir., 1976) a case decided under Section 302 of LMRA, the Court held that:

> "Whether the unjust exclusion of pensioner is obtained from the exclusive provisions of the trust fund itself, or from the arbitrary and exclusionary implementation procedures of the trustees, the ultimate effect is that the trustee is not operating for the 'sole and exclusive benefit of the employees.' "

In accord with this reasoning, the Court in *Lee v. Nesbitt, supra,* determined that the plan owes a fiduciary duty to employees and may never impose unreasonable conditions in determining benefit allocations. Clearly, the workers compensation offset provision on its face and, as applied, is unlawfully arbitrary and exclusionary and under the foregoing principles, not for the exclusive purpose of providing benefits to plan participants and their beneficiaries. The denial of pension benefits based on the offset provision is completely arbitrary. It totally excludes a deserving

employee, who has met all of the minimum requirements, who has worked all his life for the company but who happens to suffer the misfortune of a work related injury and enforces his limited right to compensation under State law, from receiving his retirement benefits. At the same time, it pays full retirement benefits to an employee who works only ten credited years for the Company, but who does not suffer a happenstance of a work related injury. The only true distinction between the employees is that one suffers a disabling injury which burdens and diminishes the enjoyment of life, and yet it is this disabled individual, rather than the healthy retiree, who forfeits and loses his retirement benefit. Such a provision is unlawfully irrational and arbitrary under the foregoing principles.

The internal arbitrary nature of the offset, as approved in Revenue Ruling 68-243, is apparent upon examination of the various differences in workers compensation throughout the United States. State compensation laws are compulsory or elective. Under an elective law, the employer or employee may accept or reject the Act. Where an employee rejects the State Act, he may sue the employer at common law. While most jurisdictions provide for compulsory coverage under workers compensation laws, coverage is still elective in three States.[2]

Application of the offset provision and Revenue Ruling 68-243 to elective compensation States demonstrates the arbitrary and capricious nature of the offset. In those States where coverage is not compulsory, or where the employee is employed by an employer of fewer than the compulsory number of employees, the employee may sue the employer at common law for damages, bypassing the Workers Compensation Act. Assuming that the employee bypassing the Workers Compensation Act obtains a judgment against his

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[2] Coverage is elective in South Carolina, New Jersey and Texas. In addition, eleven States provide for numerical exemptions of employees from Workers Compensation Acts. *Analysis of Workers' Compensation Laws*, 1980 Edition, Chamber of Commerce of the United States, Library of Congress No. 60-36379, P. VIII.

employer for his work related injury, that same employee, although his damages were unlimited at common law, does not suffer an offset of his retirement benefits by virtue of Revenue Ruling 68-243. Thus, not only is that employee entitled to damages without limitation, but also the greater damages obtained are not subject to offset by his retirement benefits. The net result is that the employee obtains a larger recovery without being subjected to the offset.

Under precisely the same circumstances, an employee in a compulsory workers compensation State has his damages for the same injuries severely limited by the Compensation Act and whatever benefits he does receive are simply deducted, offset and forfeited as against his vested retirement benefits. Thus there can be no serious question but that the operation of the offset provision and Revenue Ruling 68-243 is arbitrary and capricious and not for the exclusive purpose of providing benefits to plan participants and their beneficiaries.

CONCLUSION

Based on the foregoing, there can be little serious question but that the offset and forfeiture of vested pension benefits by workers compensation benefits not only violate the vesting and nonforfeitability provisions of Section 203(a) and Section 2(19) of ERISA, but also violate Section 403(c)(1) of ERISA. It is clear that throughout ERISA Congress consistently intended to preserve to the retirees and participants of the plan their pension benefits and to eliminate all provisions contained in pension plans which would take away those vested pension benefits. For all the reasons set forth above, *Amici* pray that the decision below be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28, the undersigned hereby certifies that on December 18, 1980 three copies of the foregoing Motion For Leave to File Brief as Amici Curiae and Brief of Amici Curiae were served by depositing the same in the United States Mail with first class postage prepaid, addressed to counsel of record at their post office addresses as follows:

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